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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, as Attorney General of the State of New York,

Appellants,

-v.-

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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January 24, 1983

QUESTION PRESENTED

Does a state statute, which authorizes pretrial detention of juveniles upon a statement of facts and reasons of an appropriate court demonstrating that, unless the juvenile is detained, there is a serious risk that he may do an act which if committed by an adult would constitute a crime, comport with the Due Process Clause of the 14th Amendment of the United States Constitution?

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ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, as Attorney General of the State of New York,

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ON APPEAL FROM THE UNITED STATES
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JURISDICTIONAL STATEMENT

STATEMENT

Appellant Ellen Schall, the Commissioner of the New York City Department of Juvenile Justice, appeals from a judgment of the United States Court of Appeals for the Second Circuit, dated September 20,

1982, which affirmed a judgment of the United States District Court for the Southern District of New York (Carter, D.J.), entered June 1, 1981, which, inter alia, adjudged that section 739 (a)(ii) of the New York Family Court Act, which authorizes under stated conditions the pretrial detention of juveniles, "is unconstitutional, both on its face and as applied, in that it contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States".

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Carter, D.J.), which appears in the Appendix at page 32a, is reported sub. nom. United States ex rel. Martin v.

Strasburg at 513 F. Supp. 681.*

The opinion of the United States Court of Appeals for the Second Circuit, which appears in the Appendix at page 1a, is reported sub. nom. Martin v. Strasburg at 689 F. 2d 365.

JURISDICTION

Alleging the constitutional invalidity of New York Family Court Act, section 739(a)(ii), appellees sought a writ of habeas corpus and a declaratory judgment pursuant to 28 U.S.C., sections 2241 et seq.; 28 U.S.C., section 2201; and Rule 57 of the Federal Rules of Civil Procedure.

*An earlier decision of the District Court denying a motion to dismiss for failure to exhaust state remedies and certifying the matter as a class action, which is dated April 3, 1978 and appears in the Appendix at page 89a, is unreported.

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 20, 1982. A notice of appeal to this Court on behalf of the Commissioner of the New York City Department of Juvenile Justice was filed in the Court of Appeals on December 3, 1982.

This appeal is being docketed in this Court pursuant to an order of Justice Marshall, dated December 10, 1982, granting an extension of time to January 23, 1983 to docket the appeal.* The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(2).

RELEVANT STATUTE

New York Family Court Act, section 739 (Book 29A, Part 1, Judiciary - Court Acts - Family Court [McKinney's Consolidated Laws of New York, Supplementary Pamphlet 1976 to 1982])

*Since January 23 is a Sunday, this Jurisdictional Statement is being served and mailed to the Court on Monday, January 24.

"§739. Release or detention after filing of a petition and prior to order of disposition

"(a) After the filing of a petition under section seven hundred thirty-one [Originating juvenile delinquency proceeding] or seven hundred thirty-two [Originating proceeding to adjudicate need for supervision], the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:

"(i) there is a substantial probability that he will not appear in court on the return date; or

"(ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

"(b) Unless the respondent waives a determination that probable cause exists to believe that he is a juvenile delinquent or a person in need of supervision, no detention under this section may last more than three days (i) unless the court finds, pursuant to the evidentiary

standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists, or (ii) unless special circumstances exist, in which cases such detention may be extended not more than an additional three days exclusive of Saturdays, Sundays and public holidays."

STATEMENT OF THE CASE

Prior State Court Determination

In a prior, unrelated State habeas corpus proceeding, the petitioner, represented by the same attorney who, with others, represents petitioners in this action, challenged the precise section here in question (FCA, § 739[a][ii], then § 739[b]) on the same grounds as those raised by petitioners herein. The Court of Appeals of the State of New York determined that "the provisions for pre-trial detention of a youth charged as a juvenile delinquent ... do not offend either the equal pro-

tection or the due process constitutional mandates". People ex rel. Wayburn (Charles L.) v. Schupf, 39 NY 2d 682, 385 N.Y.S. 2d 518, 522, 350 N.E. 2d 906, 911 (1976). No appeal was taken to this Court from that determination. See 28 U.S.C., § 1257(2).

Proceedings Below

This action was commenced in the United States District Court for the Southern District of New York by three juveniles (hereinafter, "the petitioners"), on behalf of themselves and all others similarly situated, for a writ of habeas corpus and a declaratory judgment. Petitioners alleged that since section 739(a)(ii) of the New York Family Court Act (hereinafter, "FCA") violates the Due Process and Equal Protection Clauses of the 14th Amendment of the United States Consti-

tution, their pretrial detentions pursuant to that statute were unlawful. The action was originally commenced against the Director of Detention Services of the New York City Human Resources Administration, the official then having custody of petitioners. By stipulation of the parties, the Commissioner of the New York City Department of Juvenile Justice was substituted as respondent when that Department assumed responsibility for, inter alia, juvenile pretrial detainees.* The Attorney General of the State of New York intervened pursuant to his obligation to support the constitutionality of a State statute. New York Executive Law, § 71 (Book 18, McKinney's Con.

*Ellen Schall was appointed Commissioner of the New York City Department of Juvenile Justice on January 20, 1983. She has therefore been substituted in the caption for the former Commissioner, Paul Strasburg. See Rule 40.3 of the Rules of this Court.

Laws of N.Y.).

On petitioners' motion, the District Court certified the action as a class action, defining the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) of the [Family Court] Act". App., p. 101a. Following a trial on the merits, the District Court, in a judgment entered June 1, 1981, declared FCA, section 739(a)(ii), "unconstitutional, both on its face and as applied, in that it contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States". The Court also granted writs of habeas corpus, ordering that "all members in [the respondent Commissioner's] custody pursuant to Family Court Act Section 739

(a)(ii) shall be released forthwith".* App., pp. 30a-31a.

In its opinion, the District Court concluded that petitioners' equal protection challenge to the statute in question was "insubstantial". App., p. 63a. Since petitioners did not challenge that finding in the Court of Appeals, the issue was not presented to that Court for its review. The District Court, however, did find that FCA, section 739(a)(ii), violates the

*The class action certification precludes a determination that the instant appeal is moot. In a post-judgment clarifying memorandum to all counsel, the District Court explained that "[the] writ reaches all detained juveniles held under the relevant act until this proceeding is concluded or the judgment entered reversed". Appellant Schall continues to release any juvenile remanded into her custody pursuant to FCA, section 739(a)(ii). See Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975); United States v. Edwards, 430 A. 2d 1321, 1324 n. 2 (D.C.App. 1981)(en banc), cert. denied, ___ U.S. ___, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

Due Process Clause of the 14th Amendment in that (App., p. 65a):

> "(1) it gives the judge a license to act arbitrarily and capriciously in a § 739 prediction of the likelihood of future criminal conduct which cannot result from a reasoned determination, (2) pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process, and (3) in addition, constitutes punishment that is constitutionally impermissible under the due process clause."

Upon the appeals of the Commissioner and the Attorney General to the Court of Appeals, only the District Court's finding that FCA, section 739(a)(ii), violated the Due Process Clause was presented for review. The Court of Appeals declined to reach the issue of whether pretrial detention of juveniles to prevent future crimes, per se, is constitutional, holding only that section 739(a)(ii) "does not accord procedural due process"

(App., p. 4a) since it "is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts". App., p. 17a.

Finding that over two-thirds of the detainees under section 739(a)(ii) are either "not ... adjudicated guilty or [are] not ... sentenced to confinement after an adjudication of guilt" (App. p. 21a), the Court determined that the statute has "an unconstitutional impact as to the vast majority of the juveniles detained under it" (App., p. 19a) since such detentions "involve either mistakes in judgment fostered by 739(a)(ii)'s procedurally and substantively unlimited terms or the imposition of incarceration solely as punishment for unadjudicated crimes". App., pp. 18a-19a. Having so found, the Court held that FCA, section 739(a)(ii), is unconstitutional as to all juveniles. App., p. 20a.

Judge Newman, concurring only in the result, was "less certain than the majority that the record supports a conclusion of a significant number of instances where detention was imposed either mistakenly or for purposes of punishment". App., pp. 23a-24a. In Judge Newman's view, "the statute denies due process ... not because it has been shown to yield an unacceptable number of mistaken or impermissible results, but simply because it needlessly creates an unacceptable risk of such results". App., p. 24a. The Judge proceeded to list five "readily available limitations that would reduce the risk of error" which were not included in section 739(a)(ii). App., pp. 27a.

Brief Summary of Statutory Scheme - Proceedings Concerning Juvenile Delinquents

A person under the age of 16 may be taken into custody by a police of-

ficer or a peace officer for committing an act which, if done by an adult, would constitute a crime.* FCA, § 721. While release of the juvenile to his parents or other legal custodian is preferred, the officer may also question him "for a reasonable period of time" or take him to a juvenile detention facility. FCA, § 724; see FCA, § 712(c, d, e). In the latter instance, a facility is authorized to release the juvenile to his parents or other legal guardian "unless there are special circumstances requiring his detention". FCA, § 727(b). If a child continues to be detained,

*A "juvenile delinquent" is a person over seven and less than 15 years of age who, having done an act that would constitute a crime, is not criminally responsible for such conduct by reason of infancy. FCA, § 712(a).

A "crime" is defined in New York Penal Law, section 10.00(6) (Book 39, McKinney's Con. Laws of N.Y.), as a felony or a misdemeanor.

he must be brought before a judge of the Family Court within 72 hours (FCA, § 729), at which time the Court holds a hearing "for the purpose of making a preliminary determination of whether the court appears to have jurisdiction over the child". The child is advised of his rights to remain silent, have counsel of his own choosing, and have a law guardian assigned. Unless certain specified findings are made, the child is released to his parents or other legal custodian. FCA, § 728.

Prior to the filing of a petition, the probation service is authorized to confer with the juvenile, the person seeking to file the petition, and other interested persons "concerning the advisability of filing a petition". FCA, § 734(a)(i). With certain statutory exceptions, probation may then attempt to "adjust" the case before

the filing of the petition. FCA, § 734 (a)(ii).*

A juvenile delinquency proceeding originates with the filing of a petition which alleges that a child under 16 years of age committed an act which, if done by an adult, would constitute a crime and that the child requires "supervision, treatment, or confinement". FCA, § 731(1); see FCA, § 733. According to the testimony at trial of a judge of the Family Court, if the petition is made on information and

*According to a Vera Institute of Justice Study of a New York City sample of 1890 potential delinquency cases, admitted into evidence at trial, 532 (28 percent) were adjusted informally at probation intake.

Witnesses testified that a case may be "terminated without adjustment" if a complaining witness fails to appear, has not signed a direct knowledge statement in support of the petition, or advises probation he does not want to proceed. Approximately 22 percent of the cases in the Vera Study were so terminated.

belief, it must be supported by an affidavit from someone (i.e., the victim or a witness) with direct knowledge of the incident who indicates that he has read the petition and that it is true. The petition must be approved by the appropriate corporation counsel, county attorney, or district attorney. FCA, § 734-a.

After the filing of the petition, "the court may release the [juvenile] or direct his detention". FCA, § 739(a). Such a determination is made at a hearing at which the juvenile is advised of his rights to remain silent, to be represented by counsel of his or his parents' choosing, and to be assigned a law guardian. FCA, § 741(a). At the conclusion of the hearing, the Court must order the juvenile released if it cannot state "facts and reasons" for finding that, "unless the [juvenile] is detained:

(i) there is a substantial probability that he will not appear in court on the return date [of the fact-finding hearing]; or (ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime."* FCA, § 739(a). It is this latter provision which is challenged by petitioners and which was held invalid by the Courts below. Section 739(a)(i), providing for detention upon a finding of probability of flight, is not affected by the instant proceeding. The "739 hearing" will be discussed in more detail in the following section of this Statement.

The next stage in the judicial process is the fact-finding hearing, which

*According to the trial testimony of the Family Court judge, probation service, based on its contact with the juvenile during the adjustment ("pre-petition") stage of the proceeding, makes a recommendation as to whether the child ought to be released or detained.

must occur not more than three days after the filing of the petition if the juvenile is in detention.* FCA, § 747. The purpose of this hearing is to determine whether the juvenile "did the act or acts alleged in the petition which, if done by an adult, would constitute a crime". FCA, § 712(f). Only evidence that is "competent, material and relevant" may be admitted at the fact-finding hearing, and any determination that the child did the acts complained of must be based upon proof beyond a reasonable doubt. FCA, § 744(a, b); see FCA, §§ 751, 752.** If

*If the act involved would be a class A, B, or C felony if committed by an adult, the fact-finding hearing may commence no later than 14 days after the filing of the petition. FCA, § 747.

**Upon or after a fact-finding hearing, the Family Court may order that the proceeding be "'adjourned in contemplation of dismissal'", an adjournment, upon conditions, for a period not to exceed six months "with a view to ultimate dismissal of the petition in furtherance of justice". FCA, § 749(a).

the fact-finding hearing is adjourned (FCA, § 748), a detention may not last more than three days

> "(i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that ... probable cause exists [to believe the child is a juvenile delinquent], or (ii) unless special circumstances exist, in which cases such detention may be extended not more than three additional days exclusive of Saturdays, Sundays and public holidays."*

FCA, § 739(b); see People ex rel. Guggenheim (Robert P.) v. Mucci, 32 NY 2d 307, 344 N.Y.S. 2d 944, 298 N.E. 2d 109 (1973).

Following a finding that the child committed the alleged acts, the Court holds a dispositional hearing

*The initial three day detention period is inclusive of Saturdays, Sundays, and public holidays. Matter of Kenneth D., 102 Misc 2d 363, 423 N.Y.S. 2d 423 (Fam. Ct., Kings Co. 1979).

(FCA, § 746[a]), the purpose of which is to determine whether the child requires supervision, treatment, or confinement. FCA, § 712(g). Only evidence that is material and relevant may be admitted, and an adjudication must be based on a preponderance of the evidence. FCA, § 745. Upon a finding that supervision, treatment, or confinement is necessary, an adjudication of juvenile delinquency is made, and the Court enters an appropriate order of disposition. See FCA, § 753.* **

*Throughout the sections referred to, the Family Court Act makes special provisions for "designated felony acts", i.e., acts which, if done by an adult, would constitute certain designated serious crimes, e.g., murder, kidnapping, arson. FCA, § 712(h).

**On December 20, 1982, the Governor of New York signed a bill amending the Family Court Act. L. 1982, ch. 920, as amended by L. 1982, ch. 926. The statute, effective July 1, 1983, establishes a new Article of the Act,

(footnote cont'd on next page)

THE QUESTION IS SUBSTANTIAL

SECTION 739(a)(ii) OF THE NEW YORK FAMILY COURT ACT, WHICH AUTHORIZES PREVENTIVE DETENTION OF JUVENILES UPON A STATEMENT OF FACTS AND REASONS BY THE FAMILY COURT, COMPORTS WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

(1)

This appeal provides this Court with an opportunity to address, at least in part, a question left open in Bell v.

** (footnote cont'd from previous page)

denominated "Juvenile Delinquency". The new Article will govern procedure in the Family Court regarding delinquency proceedings; Article 7, which until July 1 governs both delinquency proceedings and proceedings concerning persons in need of supervision, will thereafter cover only the latter.

The new statute contains a preventive detention section substantially identical, in relevant respects, to section 739(a)(ii). The standard for detention, "serious risk that [the juvenile] may before the return date commit an act which if committed by an adult would constitute a crime," remains the same.

Wolfish, 441 U.S. 520, 534 n. 15 (1979), that is, whether the governmental objective of protecting the community from crime may constitutionally justify the pretrial detention of juveniles.* The issue is one of critical public importance, pretrial detention being authorized by statute in a number of states. Indeed the very statute declared unconstitutional in the instant case has previously been sustained by the highest court of the State of New York. People ex rel. Wayburn (Charles L.) v. Schupf,

*As noted, petitioners' equal protection claim was rejected by the District Court, and it was neither raised in, nor decided by, the Court of Appeals. On this appeal, therefore, we do not address the issues, if any, raised by the fact that although New York does not provide for preventive detention of adults, FCA, section 739(a)(ii), authorizes such detention of juveniles. See People ex rel. Wayburn (Charles L.) v. Schupf, supra, 39 NY 2d 682, 385 N.Y.S. 2d at 520-521, 350 N.E. 2d at 908-910 (section 739[a][ii] does not violate the Equal Protection Clause of the 14th Amendment).

supra, 39 NY 2d 682, 385 N.Y.S. 2d 518, 350 N.E. 2d 906. Other courts have sustained the application of statutes permitting pretrial detention of juveniles for the protection of the community. L.O.W. v. District Court, 623 P. 2d 1253 (Colo. 1981) (child may be detained if it is "contrary to the welfare ... of the community to release the child from detention"); Morris v. D'Amario, 416 A. 2d 137 (R.I. 1980) (child can be removed from parents "when ... the safety and protection of the public cannot be adequately safeguarded without his removal").

In a case of first impression, a statute authorizing preventive detention for a maximum of 60 days of adult alleged offenders was sustained as against a constitutional challenge premised on the 5th and 8th Amendments of the United States Constitution. United States v. Edwards, 430 A. 2d 1321 (D.C.App. 1981)

(en banc), cert. denied, ___ U.S. ___, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982); see Parker v. Roth, 202 Neb. 850, 278 N.W. 2d 106, cert. denied, 444 U.S. 920 (1979).

In accord with the decisions cited, we submit that the Due Process Clause does not prohibit preventive detention of juveniles. See United States ex rel. Covington v. Coparo, 297 F. Supp. 203, 207 (S.D.N.Y. 1969) (writ of habeas corpus denied on ground state court reasonably found, inter alia, that the petitioner's release might constitute a danger to the community); cf. Campbell v. McGruder, 580 F. 2d 521, 527, 528 (D.C. Cir. 1978) ("[O]ur common law and constitutional heritage has refused to abjure the institution of pretrial detention.... '[T]he State's duty to control crime' ... justifies in the first instance the institution of

pretrial detention."). So long as a statute is carefully tailored with safeguards to protect the obvious liberty interest of the potential detainee (see, infra, pp. 27-37), the criminal justice system is sufficiently flexible to incorporate a community's legitimate concern for its safety and well-being. "[T]he sharp increase in crime and a desire to compensate for a seeming progressive breakdown of our law enforcement structure" (State v. Johnson, 61 N.J. 351, 294 A. 2d 245, 250 [1972]) are realities which are not ignored by the Constitution. While the Due Process Clause necessitates the structuring of a system such that the adverse effect of detention on the accused is not disproportionate to society's need for protection, such a system, we submit, is not precluded by the Clause in the first instance. See Note, Preventive Detention,

36 Geo. Wash. L. Rev. 178, 185-186 (1967); United States v. Edwards, supra, 430 A. 2d at 1331-1333 (pretrial preventive detention is regulatory, not penal, in nature).

(2)

In view of the fact that the New York Court of Appeals previously found the statute in question in all respects constitutional, and in light of the cases cited supra, page 24, sustaining preventive detention statutes, a substantial question for resolution by this Court is presented. As will be shown below, the procedural safeguards embodied in the New York Family Court Act satisfy the demands of due process, and the Court of Appeals erred in finding to the contrary.

A hearing pursuant to FCA, section 739(a), follows the filing of a petition which must either be on actual knowledge or supported by an affidavit of a person with knowledge attesting to the truth

of the allegations in the petition (JA: 532).* The decision to detain a juvenile pursuant to section 739(a)(ii) is made by the court, which must state the facts and reasons for the determination that "there is a serious risk that [the child] may before the return date [of the fact-finding hearing] do an act which if committed by an adult would constitute a crime". At the "739 hearing", the child is advised of his rights to remain silent, to be represented by counsel of his or his parents' choosing, and to be assigned a law guardian. FCA, § 741(a). A parent accompanying the child may be questioned regarding the behavior of the child at home, the relationship between the parent and the child, etc. (JA: 539). If a clergyman or social worker accompanies

*Numbers in parentheses preceded by "JA" are references to the Joint Appendix filed in the Court of Appeals.

the child, he may be given an opportunity to speak on the child's behalf (JA: 540). Probation, which has interviewed the juvenile and others during the intake procedure, will make a recommendation as to whether the juvenile ought to be released or detained (JA: 535). According to the testimony at trial of a Family Court judge, the factors which he and his colleagues utilize in determining whether release or detention is appropriate in a particular case include: the seriousness of the acts alleged in the petition; an evaluation, if possible, of the probability that the allegations will be sustained; the age of the victim; the time of day of the acts, indicating, perhaps, a lack of parental control; the juvenile's past record and the proximity in time of the present alleged acts to prior acts; any information developed at the hearing; and, the recommendation of

probation (JA: 549-555). This process ensures that the detention decision is made on an individual basis, supported by judicially reviewable stated facts and reasons. Compare, Huihui v. Shimoda, 644 P. 2d 968 (Ha. 1982) (denial of bail to particular class of offenders creates a conclusive presumption of dangerousness and thus violates state constitutional right to bail); In re William M., 3 Cal. 3d 16, 89 Cal. Rptr. 33, 473 P. 2d 737 (1970) (judicial decision to detain on grounds of dangerousness premised solely on act committed, without regard to individual factors involved, denies due process).

If a fact-finding hearing is not commenced within three days of the detention (inclusive of Saturdays, Sundays and public holidays) (FCA, § 747), even if the adjournment is requested by the child (People ex rel. Kaufman [Joseph P.] v. Davis, 57 AD 2d 597, 393 N.Y.S. 2d 746

[2d Dept. 1977]), there must be a hearing to determine whether there is probable cause to believe that the child is a juvenile delinquent (FCA, § 739[b]; see People ex rel. Guggenheim [Robert P.] v. Mucci, supra, 32 NY 2d 307, 344 N.Y.S. 2d 944, 298 N.E. 2d 109),* and whether there is good cause to continue the detention. Matter of Renaldo Q., 83 Misc 2d 945, 373 N.Y.S. 2d 993 (Fam. Ct., Bronx Co. 1975). Although hearsay is admissible, something more than uncorroborated hearsay must be presented before a finding of probable cause may be made. People ex rel. Guggenheim (Michael W.) v. Mucci, 46 AD 2d 683, 360 N.Y.S. 2d 71 (2d Dept.), aff'g 77 Misc 2d 41, 352 N.Y.S. 2d 561

*If "special circumstances" exist, the detention may be extended not more than three additional days, exclusive of Saturdays, Sundays, and public holidays. FCA, § 739(b).

(Sup. Ct., Kings Co. 1974).

"[D]ue process 'is flexible and calls for such procedural protections as the particular situation demands.'" Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979). In accord with the standards established in Gerstein v. Pugh, 420 U.S. 103 (1975), and balancing the liberty interests of the juveniles involved and society's interest in protecting itself against criminal acts, the procedures and standards established by the Family Court Act, as implemented by the Court (cf. Jurek v. Texas, 428 U.S. 262, 272-273 [1976] [relying on judicial construction of terms "criminal acts of violence" and "continuing threat to society" in statute defining when jury may impose death penalty]), fully comport with the Due Process Clause of the 14th Amendment. See Morris v. D'Amario, supra, 416 A. 2d at 141-142.

While we reject the conclusion of the Court of Appeals majority decision that "the record supports a conclusion of a significant number of instances where detention was imposed either mistakenly or for purposes of punishment" (see, App., pp. 23a-24a), we submit that even assuming a majority of detainees are not placed following a dispositional hearing, such a result does not mandate a finding of unconstitutionality. As properly stated by the New York Court of Appeals in sustaining FCA, section 739(a)(ii) (People ex rel. Wayburn [Charles L.] v. Schupf, supra, 39 NY 2d 682, 385 N.Y.S. 2d at 522, 350 N.E. 2d at 910):

> "[I]t must be apparent that there is a vastly different body of relevant data on which to make an informed determination as to the desirability of placement after the dispositional hearing. It should surprise no one that caution and concern for both the juvenile and society may indicate the

> more conservative decision to detain at the very outset, whereas the later development of very much more relevant information may prove that while a finding of delinquency was warranted, placement would not be indicated."

We add that, by statute, the applicable considerations are different at these distinct stages of a delinquency proceeding. At a "739 hearing", the statute requires that only the welfare of the community be considered, and the detention authorized is brief. At the dispositional phase, the court must consider not only "the need for protection of the community", but also "the needs and best interests of the [juvenile]". FCA, § 711; see JA: 591-593. That former detainees may not be placed following a dispositional hearing does not mean that due process has been denied; it is evidence, rather, that at the dispositional phase the system is, in fact, working.

Finally, assuming, as we do, that detention pursuant to FCA, section 739 (a)(ii), is otherwise constitutional, the fact that a judge is required to "predict" future behavior does not render the statute unconstitutional. As stated by the New York Court of Appeals (People ex rel. Wayburn [Charles L.] v. Schupf, supra, 39 NY 2d 682, 385 N.Y.S. 2d at 522, 350 N.E. 2d at 910):

> "Such an element is necessarily present in the administration of any bail system, in the imposition of alternatively available sentences, in the administration of a parole system, or in any other procedure in which discretionary authority for differing criminal dispositions is vested in a court or an administrative body."

The prediction of dangerousness is no more or less speculative than a prediction of flight, yet a determination that an accused may not appear for trial is recognized as a basis for denying bail. People ex rel. Weisenfeld

(Cifone) v. Warden, 37 NY 2d 760, 374 N.Y.S. 2d 631, 337 N.E. 2d 140 (1975); see Bell v. Wolfish, supra, 441 U.S. at 523. Indeed, a finding that a person poses a danger to the community can serve as a basis for denying bail pending appeal. Carbo v. United States, 82 S. Ct. 662, 666, 7 L. Ed. 2d 769 (1962) (Douglas, Circuit Justice); Leigh v. United States, 82 S. Ct. 994, 996, 8 L. Ed. 2d 269 (1962) (Warren, C.J.); but see, Williamson v. United States, 184 F. 2d 280 (2d Cir. 1950) (Jackson, Circuit Justice). A prediction of dangerousness, moreover, has been approved by this Court as a basis for imposing capital punishment, certainly the ultimate deprivation of liberty. Jurek v. Texas, supra, 428 U.S. at 274-276.

Testifying at trial, a judge of the New York Family Court stated (JA:

598-599): "[I]n my experience in New York City, we do have situations where, if for no other reason but for the protection of the community, we must have some means in certain cases for detention." FCA, section 739(a)(ii), which is "designed to avoid any routine detention of a child" (Committee Comments to section 739, Book 29A, McKinney's Con. Laws of N.Y., p. 619), recognizes that need and does so with due regard for the rights of juveniles.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of the appeal.

January 24, 1983.

Respectfully submitted,

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Corporation Counsel of the
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Attorney for Appellant Schall.

LEONARD KOERNER,
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82-1248

No. -

Supreme Court, U.S.
FILED
JAN 24 1983
Alexander L. Stevas, Clerk

IN THE

Supreme Court of the United States

October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

APPENDICES TO JURISDICTIONAL STATEMENTS FOR APPELLANT AND INTERVENOR-APPELLANT

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APPENDIX A

Opinions and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 526, 706—August Term, 1981

(Argued January 12, 1982 Decided September 20, 1982)

Docket Nos. 81-2175, 81-2193

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Petitioners-Appellees,

—v.—

PAUL STRASBURG, as Commissioner of the New York City Department of Juvenile Justice,

Respondent-Appellant,

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant.[†]

Before:

OAKES, NEWMAN and WINTER,

Circuit Judges.

[†] Text of opinion includes corrections made by the Court of Appeals as of January 1, 1983.—*Ed.*

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York (Carter, *Judge*), declaring New York Family Court Act § 739(a)(ii) unconstitutional.

Affirmed.

JUDITH A. GORDON, Assistant Attorney General (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Assistant Solicitor General, Florence E. Abrams, Assistant Attorney General, New York, New York), *for Intervenor-Appellant.*

MARTIN GUGGENHEIM, New York, New York (Bruce J. Ennis, American Civil Liberties Union, New York, New York), *for Petitioners-Appellees.*

LENORE GITTIS, New York, New York (Janet R. Fink, Charles A. Hollander, The Legal Aid Society, New York, New York), *for Petitioners-Appellees.*

WINTER, *Circuit Judge:*

This appeal involves a constitutional challenge to a provision of the New York Family Court Act[1] authorizing pre-

1. The New York Family Court Act has been codified at Book 29A, Part I, Judiciary—Court Acts (McKinney 1975 Supp. 1981). References to the Family Court Act will be cited as "FCA § ——." The preventive detention statute challenged in this action is FCA § 739(a), which provides:

(footnote continued on next page)

ventive detention of accused juvenile delinquents. It was brought in the District Court as a habeas corpus class action against the defendant Paul Strasburg, Commissioner of the New York City Department of Juvenile Justice, under 28 U.S.C. § 2254, Robert Abrams, Attorney General of the State of New York, intervening as a defendant. Judge Carter certified the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention . . .," under the challenged statute. A trial resulted in a record of documentary and testimonial evidence about the actual practice of the Family Court in utilizing preventive detention, including expert testimony by a Family Court Judge, statistical studies and a collection of representative case studies.

Judge Carter held the statute unconstitutional. 513 F. Supp. 691 (S.D.N.Y. 1981). He issued a judgment granting the writ to all juveniles detained under the challenged provisions at any time before conclusion of this action. Defendants appealed. We affirm on the grounds that the statutory scheme and practice under it violate the Due Process Clause of the Fourteenth Amendment in that the period of pre-trial detention is utilized principally to impose punishment before adjudication of the alleged criminal acts.

---

§ 739. *Release or detention after filing of petition and prior to order of disposition.*

(a) After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:

(i) there is a substantial probability that he will not appear in court on the return date; or

(ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

Appendix A

THE STATUTORY SCHEME SUMMARIZED

Since our decision rests on a belief that the Family Court Act does not accord procedural due process, it is important to understand the procedural structure of New York delinquency adjudications. Although these juvenile proceedings are somewhat different from adult criminal proceedings in both ends and means, their major procedural stages have analogues in the adult criminal justice process. A juvenile proceeding is initiated by a petition for delinquency,[2] a step analogous to an indictment. The case then goes to fact-finding before a Family Court Judge, at which time the juvenile is either adjudicated a delinquent or the petition is dismissed.[3] The analogue in the criminal law is, of course, the trial and verdict. The final stage is a determination of the disposition by a Family Court Judge,[4] analogous in the criminal law to adult sentencing. We set out these analogues, not to argue that the constitutional limitations on juvenile courts are identical to those imposed on adult criminal tribunals, but solely to facilitate an understanding of the result we reach.

---

2. FCA § 731 prescribes the function and content of a delinquency petition:

> 1. A proceeding to adjudicate a person a juvenile delinquent is originated by the filing of a petition, alleging:
>
> (a) the respondent did any act which, if done by an adult, would constitute a crime and specifying the act and the time and place of its commission;
>
> (b) the respondent was a person under sixteen years of age at the time of the alleged act; and
>
> (c) the respondent requires supervision, treatment, or confinement.

3. *See* FCA §§ 744, 752.

4. *See* FCA § 753.

Appendix A

The statutory scheme can be summarized as follows. The challenged provision is Section 739(a)(ii). It authorizes detention of a juvenile after filing of a petition, but before fact-finding, when a Family Court Judge determines "there is a serious risk that [the juvenile] may before the return date do an act which if committed by an adult would constitute a crime." Juveniles detained under 739(a)(ii) are entitled to a probable cause hearing within three to six days and an expedited fact-finding hearing.[5] If delinquency is adjudicated at fact-finding, a probation investigation and, in the case of "designated felony acts,"[6] a

5. FCA § 747 mandates that, if the respondent is in detention, a fact-finding hearing shall commence, unless adjourned, not more than three days after the filing of the petition against the respondent unless the respondent is charged with an act which if committed by an adult would constitute a Class A, B or C felony, in which case the fact-finding hearing shall commence within fourteen days. FCA § 739(b) provides that the respondent may not be detained more than three days, barring waiver or adjournment, unless the court finds probable cause. However, under "special circumstances," a juvenile may be detained for as long as six days without a probable cause determination having been made.

6. A "designated felony act" is defined in FCA § 712(h) to include the following offenses:

> (h) "Designated felony act". An act which, if done by an adult, would be a crime (i) defined in section 125.27 (murder in the first degree); 125.25 (murder in the second degree); 135.25 (kidnapping in the first degree); or 150.20 (arson in the first degree); 130.70 (aggravated sexual abuse); 135.20 (kidnapping or fifteen years of age; (ii) defined in section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); 130.35 (rape in the first degree); 130.50 (sodomy in the first degree); 130.70 (aggravated sexual abuse); 135.20 (kidnapping in the second degree), but only where the abduction involved the use or threat of use of deadly physical force; 150.15 (arson in the second degree); or 160.15 (robbery in the first degree) of the penal law committed by a person thirteen, fourteen, or fif-

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diagnostic assessment[7] precede the dispositional hearing. The Family Court Judge can choose among several alternative dispositions, including suspension of judgment,[8] probation,[9] placement at home or with other individuals,[10] placement in a facility or school where treatment is available[11] or restrictive placement (incarceration).[12] The statutory criteria for determining the appropriate disposition emphasize the needs and best interests of the juvenile, the information provided by the probation investigation

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teen years of age; (iii) defined in the penal law as an attempt to commit murder in the first or second degree or kidnapping in the first degree committed by a person thirteen, fourteen or fifteen years of age; (iv) defined in section 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); or subdivision two of section 160.10 (robbery in the second degree) of the penal law committed by a person fourteen or fifteen years of age; (v) defined in section 120.05 (assault in the second degree) or 160.10 (robbery in the second degree) of the penal law committed by a person fourteen or fifteen years of age but only where there has been a prior finding by a court that such person has previously committed an act which, if committed by an adult, would be the crime of assault in the second degree, robbery in the second degree or any designated felony act specified in clause (i), (ii) or (iii) of this subdivision regardless of the age of such person at the time of the commission of the prior act; or (vi) other than a misdemeanor, committed by a person at least seven but less than sixteen years of age, but only where there has [sic] been two prior findings by the court that such person has committed a prior act which, if committed by an adult would be a felony.

7. *See* FCA § 750(3).

8. FCA § 755.

9. FCA § 757.

10. FCA § 756(a)(i).

11. FCA § 756(a)(ii), (iii).

12. FCA § 753-a.

and diagnostic assessment, the character of the offense and the need for protection of the community.[13] Some alternatives, however, are foreclosed or available only on a limited basis. The Family Court Judge has no option to transfer the juvenile to an adult criminal tribunal. In addition, placement in a treatment facility turns upon the availability of space and the consent of the particular facility.[14] Even though a Family Court Judge may determine that placement for treatment is the appropriate disposition, therefore, the actual options in a particular case may be limited to probation or incarceration.

The statutory scheme thus contains facial incongruities. Preventive detention is authorized solely upon a finding that a juvenile may do an act in the interim between the petition and fact-finding which would be a crime if done by an adult. The potential crimes are not limited to felonies or violent crimes but include every act which constitutes a crime under the New York Penal Law.[15] The statute itself

13. *See generally* FCA §§ 711, 753-a(2).

14. *See* note 30, *infra; Cf.* P. Prescott, *The Child Savers*, 197 (1981).

15. The term "crime" is defined in New York Penal Law § 10.00(6) as any felony or misdemeanor. Thus, offenses such as playing three-card monte can, and, as the record reveals, sometimes do trigger the sanction of 739(a)(ii). This is in contrast to the District of Columbia pretrial detention statute, D.C. Code 1973, § 23-1322, upheld in *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981), under which a suspect may be detained for up to 60 days pending trial only if that suspect has been charged with the commission of a "dangerous crime" (*i.e.*, taking or attempting to take property from another by force or threat of force, unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to com-

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offers no procedural safeguards and does not set out substantive criteria, other than the conclusory "serious risk" test, such as prior court contacts or lack of family supervision, to limit which accused juveniles may be detained.[16] At disposition, on the other hand, elaborate statutory provision is made for collecting diagnostic and other information, and specific criteria are established to guide the Family Court Judge.[17]

THE STATUTORY SCHEME IN PRACTICE

The incongruities of the statutory scheme yield a paradoxical result in practice. The parties have waged a battle of statistics regarding the actual disposition of cases involving juveniles detained under 739(a)(ii).[18] However,

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mit an offense therein, arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, forcible rape, or unlawful sale or distribution of narcotics) or a "crime of violence" (*i.e.*, murder, forcible rape, carnal knowledge of a female under the age of 16, taking or attempting to take immoral, improper or indecent liberties with a child under the age of 16, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year). Moreover, the judicial officer ordering preventive detention must find a substantial probability that the suspect committed that offense prior to the imposition of pre-trial detention. *Id.* § 23-1322 (b)(2)(C).

16. The case histories in the record reveal instances of detention under 739(a)(ii) of first offenders.

17. *See* note 7, *supra*.

18. The record contains statistical compilations utilized by the parties to dispute the number of 739(a)(ii) detainees released at or

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one critical fact has been established—the vast majority of juveniles detained under 739(a)(ii) either have their petitions dismissed before an adjudication of delinquency or are released after adjudication. Of the representative case studies submitted as evidence, for example, the defendants' version of events indicates that well over two-thirds of the

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before disposition. These include a monograph prepared by the Vera Institute of Justice and Court Administration Reports for the years 1977 and 1979. None of the data, apart from the representative case histories, allow a precise comparison of detained juveniles restrictively placed and released at disposition. The Vera Study, based on New York City juveniles, lumps detentions under 739(a)(ii) with detentions under 739(a)(i), while the Court Administration Reports, based on statewide data, suffer from that same imprecision but also do not indicate how many restrictively placed juveniles were ever detained. The Vera Study, relied upon by petitioners, indicates that of the detained juveniles, 49% have their cases dismissed before trial, 21% are dismissed or released after trial, and only 30% are restrictively placed. The Vera Study also demonstrates that, although one-third of the delinquency petitions filed results in pre-trial detention, only 11% of all petitions results in restrictive placements. Since the detainees include those held under (i) as well as (ii), it is not conclusive for our purposes. The defendants, on the other hand, apply a factor derived from the Vera Study's sample of placed juveniles who were not detainees to data reflecting total restrictive placements contained in the Court Administration Reports. From that, they estimate that slightly less than 50% of the juveniles detained under 739(a)(ii) are not placed at disposition. Neither position can be relied upon for total accuracy. The defendants' position, however, is the least reliable. It not only suffers from the overinclusiveness of both studies but also attempts to combine selected data from a study based on New York City with selected data from statewide statistics.

We find that the case studies and the Vera Study established that the great majority of detainees under 739(a)(ii) are released before or at disposition. Although the defendants have superior access to generalized statistics and at least an equal opportunity to present a countersample of case studies, they choose to rely solely upon the most vulnerable data in the record. Even that data, however, indicates that close to half of all (ii) detainees are quickly released.

juveniles held under 739(a)(ii) were released at or before the dispositional hearing.[19]

The result in practice is that the vast majority of juveniles considered sufficiently dangerous by the Family Court to justify pre-trial incarceration under 739(a)(ii) are in fact released by prosecutors or by the Family Court within days or weeks. Defendants attribute this peculiar result to the statutory incongruities described above. Detention decisions under 739(a)(ii) emphasize crime prevention and are made on the basis of limited information presented in summary fashion. Dispositional determinations, on the other hand, take the juvenile's welfare and potential for treatment into account and are based on more detailed and extensive information.

The defendants offered expert testimony by a Family Court Judge concerning the actual practice under the statutory scheme.[20] He testified that the detention hearing under 739(a)(ii) usually involves only the Family Court Judge, a prosecutor, a Court Liaison Officer, the juvenile,

19. The representatives of the thirty-four case histories in the record is not challenged by the defendants. Adopting the defendants' version of these histories, final dispositions are known for thirty-two of the juveniles. The petition of delinquency and results of fact-finding of one juvenile were not offered for admission into evidence and the record of another juvenile reflects only that he was paroled pending receipt of certain investigation materials. The vast majority of that sample, twenty-three of the juveniles, or 70%, were released at or before disposition stage. Twelve of these cases resulted either in a dismissal, withdrawal or adjournment in contemplation of dismissal before fact-finding; the remaining eleven resulted in either probation or a suspended sentence.

20. Testimony of Judge Cesar Quinones, Transcript of Trial Proceedings, pp. 435-513; Joint App. at 521-99.

his or her attorney, and the parents or their representative.[21] It takes place soon after the arrest and a stenographic record is kept. In the typical case, the evidence before the Judge is limited to: (a) the petition for delinquency and an affidavit by a witness stating the petition is accurate; (b) a recommendation by the Court Liaison Officer to detain or release the juvenile based on inquiries and recommendations made by a probation officer who is usually not present; (c) statements by the juvenile or his or her attorney and by the parents or other persons accompanying the juvenile.[22]

The Family Court Judge testified that the criteria utilized in practice under 739(a)(ii) emphasize matters going solely to the protection of the community. These include prior record, recent court contacts, seriousness of the charge, and adequacy of supervision.[23] He emphasized that the criteria do not include the interests of the child and often result in confinement under circumstances harmful to the juvenile.[24] The same witness testified that the

21. *Id.* at 477; Joint App. at 533.

22. *Id.* at 463; Joint App. at 549.

23. *Id.* at 465-68; Joint App. at 551-54.

24. Judge Quinones testified about the purpose of 739(a)(ii) detention and emphasized that such detention may be harmful to the juvenile:

> Q. [by Ms. Gordon] Judge, what is your opinion of the purpose of the dention that Section 739(a)(2) [sic] authorizes?
>
> * * * *
>
> A. [by Judge Quinones] I believe that the purpose of 739(a) is really the protection of the community. I believe that's the basic purpose for that provision.
>
> Q. If that statute serves the interest of the child at all, in what sense does it serve the child's interest, if you have an opinion?
>
> A. If it serves the child's interest at all, it would be the minimal benefit that while he is in detention, he is not committing another

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factors taken into account at the dispositional hearing differ substantially from those utilized at the 739(a)(ii) hearing. At disposition, the best interests of the child are the principal concern and further detention is regarded as a "harsh solution."[25] Moreover, considerably more infor-

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crime; if that can be called a benefit to the youngster, but I don't believe that detention is actually for the benefit of the youngster, not under this statute.

I certainly would not remand anybody for benefit. Perhaps you might find a rare case where somebody might be so favorably or so shockingly effected by a short stay in juvenile center that that might turn him around, but I don't believe that is the purpose he is put there, no. You put them in for their own good, I'm sorry.

Q. Are there any disadvantages or bad effects from the detention or the pre-trial detention of a juvenile in your opinion?

A. Yes.

Q. What are they?

A. In my opinion, all defenses [sic: detentions], juvenile or adult, can have bad effects. For one thing, we are talking about youngsters of tender age. You are taking them away from their family. I mean, that's bound to have a psychological . . . detrimental effect on them.

Id. at 479-80; Joint App. at 565-66.

25. Judge Quinones testified about the standards in dispensing punishment at disposition, as follows:

Q. [by Mr. Guggenheim] How can you account, Judge, for the fact in a case where the initial reaction of the court is to detain a child based on a prediction that he will commit another crime or crimes if not detained with an ultimate disposition in the case of probation?

A. [by Judge Quinones] Probation indicates that there has been a finding in the case. You have to have a fact-finding otherwise probation wouldn't be discussed.

Now, when it comes to the dispositional hearing, the main purpose of the dispositional hearing or the main thrust would be the best interest of the child. In a dispositional hearing you are supposed to keep the child's best interest at heart and I think

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mation about the child is before the Family Court Judge at the dispositional hearing than is available at the 739(a)(ii) hearing. Not only is the information more complete and up-to-date, but psychological assessments are also provided.[26]

Two other facts influence the lenient disposition of adjudicated delinquents. First, as the evidence of the defendants demonstrated[27] and as they emphasized at oral argument,[28] the time served, including the preventive detention period, is frequently considered sufficient punishment by the Family Court. Juveniles detained under 739(a)(ii) may be held in a secure facility and exposed to

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that—well, speaking for myself, I think that any kind of detention at a dispositional hearing is a very harsh solution to the problem and you will look for the least harmful or to the most beneficial disposition at dispositional hearing keeping the best interest of the child in mind and many times that is probation.

Id. at 505-06; Joint App. at 591-92.

26. *Id.* at 506-07; Joint App. at 592-93.

27. On redirect examination, Judge Quinones added:

Q. [by Ms. Gordon] At the dispositional hearing, Judge Quinones, do you take account of the fact that a child who has been previously remanded has already spent some time in a restrictive environment in coming to your disposition?

A. [by Judge Quinones] Yes, that is taken into consideration also.

Id. at 507; Joint App. at 593.

28. At oral argument before this Court on January 12, 1982, counsel for the defendants argued:

One of those decisions commonly made by a judge is that if a person has been detained, even in lieu of bail, that the person has done sufficient jail time, to use that term loosely. Accordingly, to say that a Family Court Judge who issues a disposition three months, six months later to a child who has been detained, may simply be a statement that the child has already done enough time.

Verbatim Transcript of Oral Argument, January 12, 1982, p. 21.

assault and criminal subcultures.[29] Family Court Judges who consider detention "harsh" in the first place and not in the juvenile's interests, will understandably give great weight to prior confinement.

Second, as already noted, placement in a treatment facility, an intermediate disposition between probation and incarceration, is feasible only when a treatment facility has space and agrees to accept the child. In some cases, therefore, the Family Court Judge may face a choice between a disposition regarded as too lenient and another regarded as too harsh. The former may then be chosen as more likely to further the best interests of the child. The practical inability to provide placement in a treatment facility for criminally inclined juveniles has led to public expressions of frustration by Family Court Judges in response to criticisms of lenient dispositions.[30]

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29. Judge Quinones noted in his discussion of the harmful effects of pre-trial detention the detriment accompanying detention in a secure facility:

> A. [by Judge Quinones] Then again, juvenile center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they possibly might be and it might have a bad effect in that respect.

Transcript of Trial Proceedings at 480; Joint App. at 566.

30. Judge Edward J. McLaughlin, the Chairman of the Association of New York State Family Court Judges, stated recently:

> In adjudicating issues involving alleged delinquents, the Legislature provided that there be two trials. The first, known as a fact-finding hearing, would be conducted essentially under the due process rules of a criminal proceeding. If the facts were proven beyond a reasonable doubt, the court was obliged to conduct a second trial to determine whether the delinquent was in need of treatment and, further, whether treatment was available.

(footnote continued on next page)

Appendix A

Prosecutors take into account judicial attitudes in the juvenile analogue to plea bargaining, and the dismissal rate is accelerated in the anticipation that particular juveniles will be released even if adjudicated delinquent. The record indicates that a large percentage of juveniles detained under 739(a)(ii) in fact have their petition dismissed before fact-finding. Of the case studies, the defendants' version indicates that over one-third were released under such circumstances.[31]

The net result of this combination of statutory language and conscious judicial practice thus is that by far the greater number of juveniles incarcerated under 739(a)(ii) will never be confined as a consequence of a disposition imposed after an adjudication of delinquency, the usual course of events being either a dismissal before adjudication or release upon a post-adjudication dispositional hearing.[32]

It is the requirement regarding the availability of treatment that exposes the court to its greatest public criticism. The Legislature did not permit the judge to punish the delinquent. Neither is the judge allowed to compel any institution to accept the delinquent for treatment: the treatment facility determines whether help is available.

This mandate led to the most glaring dissatisfaction with the court, since it is the delinquent most in need of help—the sickest, if you will—who is the least likely to be found eligible for treatment by any existing facility. The situation thus created resembles the case of a terminally ill patient who is not accepted into a hospital, not because he doesn't need treatment but because no treatment is available.

N.Y. Times, March 15, 1982, p. A16, col. 3.

31. *See* note 20, *supra*.

32. Part of the detention period for some of these juveniles is between fact-finding and disposition and thus occurs after an adjudication of the alleged criminal acts. The testimony was that in the usual course of events, those juveniles detained under 739(a)(ii) will continue to be held once adjudicated while those not held in the pre-trial period will continue to be free pending disposition.

Appendix A

DISCUSSION

The presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt are important elements of Due Process itself, *In re Winship*, 397 U.S. 358 (1970), which would be gravely diminished in the protection they afford if individuals can be routinely incarcerated pending trial. Even the most persuasive demonstration of innocence cannot prevent the deprivation of liberty if incarceration precedes, rather than follows, the adjudication of criminal liability.

The only exceptions presently recognized to this general rule appear to be brief detentions pending bail hearings, detention for failure to post bail subject to the Eighth Amendment's prohibition on "excessive" bail, or in limited classes of cases, denial or revocation of bail. *See generally* C. Whitebread, *Criminal Procedure* §§ 17.01-17.03 (1980).

The extent to which exceptions other than those relating to bail may be carved out is not clear. We believe all would agree, however, that any exception to the general rule that incarceration follow, rather than precede, adjudications of guilt can be justified, if at all, by a compelling governmental interest. *Cf. Gerstein v. Pugh*, 420 U.S. 103 (1975). The defendants argue, in the case of 739(a)(ii), that crime prevention is such an interest. That statute ostensibly responds to calls for preventive detention to protect the community from criminally inclined individuals. As conceived by its proponents, preventive detention is a method of confining inherently dangerous individuals accused of crimes pending trial and sentence of confine-

ment. *See* Note, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1496-98 (1966). The underlying theory is not that propensity alone justifies confinement but that the expectation of an adjudication of guilt and subsequent sentence of confinement, along with a finding of propensity, justifies protecting the community from the individual in the interim period. Hruska, *Preventive Detention: The Constitution and the Congress*, 3 Creighton L. Rev. 36, 46 (1969). Such a scheme raises serious constitutional questions which the parties have asked us to address. We decline, however, to reach those issues because 739(a)(ii) is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts.

Crime prevention simply does not provide a justification for the detention of the vast majority of juveniles actually held under 739(a)(ii). Family Court Judges, we are told, release large numbers of detainees at disposition because much more information pertaining to the particular juvenile is available there than at the detention stage and because the Judges tend to find that the time already served is punishment enough. While the record is silent as to explanations for the similarly large number of prosecutorial dismissals before adjudication, it can be inferred that such cases as a class involve facts even less compelling as to guilt or appropriateness of further incarceration.

Accepting the defendants' view, the vast majority, in all likelihood over two-thirds, of the 739(a)(ii) detainees fall into one or more of the following categories: (1) those against whom the evidence of guilt is weak or insufficient; (2) those who are not so dangerous that they cannot be

released after a short period of detention; and (3) those who are regarded as having served enough time in confinement. Crime prevention is not a sufficiently compelling governmental interest as to any of these detainees to justify shortcutting the fundamental procedural requirement that imprisonment follow, rather than precede, adjudication. Category (1) involves detainees ultimately released by prosecutorial dismissal or on a judicial finding of insufficient evidence. As to them, incarceration is imposed but guilt is never adjudicated. Category (2) involves detainees about whom a mistaken judgment was made in the course of the summary hearing held under 739(a)(ii). As to them, no constitutional purpose justifies their detention. Category (3) involves adjudicated delinquents considered to have been punished enough by the time served. No compelling governmental interest justifies the imposition of sanctions on members of this group before, rather than after, adjudication. As to them, detention serves the purpose of punishment rather than crime prevention, since early release—within days or at most a few weeks—by a Family Court Judge contradicts any asserted need for pre-trial confinement to protect the community.[33]

In practice, therefore, the vast majority of the pre-trial detentions involve either mistakes in judgment fostered by 739(a)(ii)'s procedurally and substantively unlimited terms or the imposition of incarceration solely as punish-

33. The state defendants have not contended, and the record contains no evidence, that the period between arrest and disposition entails a greater risk of criminal acts by juveniles than the post-disposition period.

ment for unadjudicated crimes. To the degree that the goal of crime prevention is implicated at all in the actual operation of 739(a)(ii), it is only as to the minority, perhaps less than one-third, of the juveniles actually detained under its provisions. As to this group, moreover, only the risk that some might commit crimes is eliminated.

In re Winship, supra, directly ruled that an adjudication of delinquency which entails the possibility of institutional confinement must rest on proof beyond a reasonable doubt, because such confinement is constitutionally analogous to punishment for criminal acts. The provision invalidated in *Winship* under the Due Process Clause was in fact a provision of the New York Family Court Act which applied a preponderance of the evidence test in delinquency adjudications. The practice under 739(a)(ii) is, if anything, more offensive since confinement is imposed initially only upon a verified petition and later at best upon a finding of probable cause.[34] The Family Court Judge ordering detention is well aware that most detainees will either not go to fact-finding or, if they do, will be released on probation. Section 739(a)(ii) thus incarcerates—punishes—large numbers of persons upon a standard of proof which is constitutionally invalid and which cannot be justified in the name of crime prevention.

Section 739(a)(ii) thus has an unconstitutional impact as to the vast majority of the juveniles detained under it. We must now determine whether the statute is invalid as

34. Although in practice the Family Court requires a verified petition in 739(a)(ii) proceedings, the statute itself does not make likelihood of guilt a condition precedent to detention. A probable cause hearing, analogous in all relevant respects to an arraignment, is held within three to six days after a decision to detain.

to all juveniles or whether individual detainees must litigate the particular circumstances of their confinement.

We hold 739(a)(ii) unconstitutional as to all juveniles. The preponderant number of persons affected by its terms suffer punishment without adjudication of guilt beyond a reasonable doubt and absent a compelling governmental interest. Individual litigation, however, is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined. Moreover, the record clearly demonstrates that the unconstitutional impact of the statute results directly from its substantively and procedurally unlimited terms which cause Family Court Judges to incarcerate juveniles they know will be released before or at disposition. Whether we view the statutory scheme as commanding the results it in fact attains or as simply failing "to provide sufficiently clear guidance for police, prosecutors and the courts to enforce [it] in a manner . . . consistent with [the Due Process Clause]," *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974) *aff'd sub nom. Lefkowitz v. Newsome*, 420 U.S. 283 (1975), matters not, for under either view it violates constitutional guarantees.[35]

35. Our view conflicts with that of New York's Court of Appeals, which has upheld 739(a)(ii) against constitutional attack. *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518 (1976). Although the burden of the Court's opinion was directed to a claim that differential treatment of juveniles and adults violated the Equal Protection Clause, it recognized that preventive detention under 739(a)(ii) is imposed upon large numbers of juveniles who are in fact released after the dispositional hearing. This was attributed to the superior information available at that stage to inform the Family Court Judge as to the proper disposition. The Court held this constitutionally insignificant. We disagree for the reasons stated.

Appendix A

Our decision is strictly limited to the precise issue before us. We hold only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt. In such circumstances, the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard. We intimate no view as to the constitutionality of preventive detention in other circumstances.

The sole remaining issue is the scope of the relief granted. Judge Carter allowed this habeas corpus action to proceed as a class action, certifying the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) . . . ." Appellants do not challenge this certification. His order, entered on June 1, 1981, provided that the writ be granted as to all members of that class, *i.e.*, those detained under 739(a)(ii) at any time before this action is concluded. Appellants challange the order on the grounds that it grants *in futuro* release to individuals whose incarceration begins only after entry of judgment in the District Court. Class actions are permissible in habeas corpus proceedings, *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974), *cert. denied* 421 U.S. 921 (1975), and the writ is available to attack future confinement, *Peyton v. Rowe*, 391 U.S. 54 (1968). It is also clear, however, that the remedy of habeas corpus is directed to the unlawful custody of individuals, while

prospective relief against enforcement of an invalid statute must be obtained in an action for an injunction under 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). The prospective effect of Judge Carter's order affects only those detained in custody while this action continues, not those who may be detained thereafter. We believe that the "in custody" language of 28 U.S.C. § 2254 does not require institution of repeated individual actions for each new detainee while an appeal from a judgment in a class action is being actively considered. The fact of potential custody is clearly present during the period of litigation, and the defendants are always free to seek a stay of any such order from the appellate court. The order below thus does not significantly expand use of the writ.[36]

Affirmed.

NEWMAN, *Circuit Judge*, concurring:

I concur in affirming the judgment holding unconstitutional New York's preventive detention law for accused juvenile delinquents, N.Y. Family Court Act § 739(a)(ii) (McKinney 1975), but my reasoning differs from that set forth in Judge Winter's thoughtful opinion for the Court. All members of the panel are in agreement that, even if

36. This issue is apparently contested only because the state defendants believe that however unconstitutional 739(a)(ii) may be, injunctive relief is unavailable because the only feasible defendants are Family Court Judges who are immune from suit under § 1983. Brief of Intervenor-Appellant, p. 85, note, p. 86, note. Relief from 739(a)(ii) is, in their view, available only through successive individual habeas corpus actions. However, we fail to see why a custodial official holding a juvenile under the authority of 739(a)(ii) is not subject to a Section 1983 action.

the Constitution permits preventive detention of those not yet found to have violated adult penal statutes or juvenile delinquency laws, this New York provision fails to comport with the requirements of the Due Process Clause of the Fourteenth Amendment. The majority concludes that section 739(a)(ii) denies liberty without due process because in the "vast majority" of instances where detention has been ordered either "mistakes in judgment" have been made concerning the finding of serious risk that the accused may commit a crime or the detention has been imposed "solely as punishment for unadjudicated crimes."[1] Slip op. ——, *supra*. The "mistakes in judgment" are said to be fostered by the statute's "procedurally and substantively unlimited terms," that is, the statute's grant of limitless discretion to Family Court judges making the detention decision has in fact led to an unacceptable number of mistaken decisions. These instances of detention imposed for the purpose of punishment are found to conflict directly with the constitutional requirement that punishment be imposed only after adjudication of guilt. *See In re Winship*, 397 U.S. 358 (1970). I am less certain than the majority that the record supports a conclusion of a significant number of instances where detention was im-

1. It is arguable that, with respect to those accused of crime, pretrial detention imposed solely for the purpose of preventing the commission of future crimes prior to trial is punishment. With respect to those *convicted* of crime, the imposition of added confinement, beyond the penalties for the specific offense, is nonetheless punishment despite the prospective purpose of preventing future harm. *Specht v. Patterson*, 386 U.S. 605, 608-09 (1967). The extension of that principle to those *accused* of crimes raises the broad issue of whether pretrial detention to prevent future crime is ever permissible, an issue that need not be faced in deciding this case. For purposes of this appeal, I am willing to assume that pretrial detention ordered for the purpose of preventing future crime serves a regulatory purpose.

posed either mistakenly or for purposes of punishment. Nevertheless, under traditional analysis of the requirements of the Due Process Clause, I am persuaded that New York's statute is unconstitutional because it permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion as to an issue of considerable uncertainty—likelihood of future criminal behavior. In short, the statute denies due process, in my judgment, not because it has been shown to yield an unacceptable number of mistaken or impermissible results, but simply because it needlessly creates an unacceptable risk of such results.

Traditional due process analysis requires consideration of three factors in determining the constitutional adequacy of procedures by which a governmental interest is advanced at the expense of an individual interest: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The private interest impaired by § 739(a)(ii) is personal liberty, obviously of fundamental importance. The power of arrest, subject to Fourth Amendment limitations, permits that interest to be impaired in advance of an adjudication of guilt, but not under procedures that fail to provide "sufficiently clear guidance for police, prosecu-

tors, and the courts" so that the Fourth Amendment is observed. *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166, 1174 (2d Cir. 1974). The precise private interest at issue in this case is personal liberty after arrest and before trial under circumstances where a court has already determined that there does not exist a substantial probability of flight.[2]

The governmental interest is the prevention of future crimes, obviously of great significance in general, but of high value in a particular case only to the extent that the pretrial detention of a person will prevent the commission of a crime that he would have committed if not detained, or will at least significantly reduce the risk of his committing such a crime. Of course, while detained the person will not commit an ordinary street crime against members of the public; the uncertainty in determining whether his pre-trial detention advances a governmental interest arises from the difficulty of predicting whether he would have committed a crime if not detained, or assessing at least the probability of his doing so. That difficulty requires consideration of the third due process factor, the risk of an erroneous deprivation and the probable value of safeguards.

The hazards of predicting human behavior are well known. They are not diminished when the issue is whether a person arrested for one crime will, in the interval prior to his trial, commit another crime. Presumably, the legislative judgment reflected in New York's statute rests primarily on

2. The juvenile may be detained if "there is a substantial probability that he will not appear in court on the return date." N.Y. Family Court Act § 739(a)(i) (McKinney 1975).

the traditional rationale for preventive detention: a person who has committed a crime may have a propensity for committing crimes, and the likelihood that an arrested person has in fact committed a crime may be a sufficient basis for including him in the class of those who are likely to commit other crimes. Perhaps, in addition, the legislature believed that some persons accused of crime may expect that they will be convicted and may estimate that they are unlikely to receive enhanced punishment for a crime committed prior to sentencing on the initial charge. Under the stress of apprehending punishment, they may mistakenly think they can with impunity commit a "free" crime.[3]

The spirited debate over preventive detention has focused primarily on whether the "propensity" rationale has sufficient validity to justify the risk of detaining some individuals after arrest who in fact would not have committed a crime if not detained prior to trial.[4] It is not necessary in this case to assess the ultimate issue whether

3. Since the challenged statute authorizes detention only on the basis of a prediction of commission of a future crime, it does not purport to rest on other rationales advanced in support of some juvenile detention statutes that concern protecting the juvenile from dangerous home conditions or assuring his availability for study or treatment. *See* Comment, *A Due Process Dilemma: Pretrial Detention in Juvenile Delinquency*, 11 John Marshall J. Prac. & Proc. 513 (1978); Note, *The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of "Crime,"* 18 Vand. L. Rev. 2096 (1965).

4. *Compare* Hruska, *Preventive Detention: The Constitution and the Congress*, 3 Creighton L. Rev. 36 (1969), and Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223 (1969), *with* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371 (1970), and Hickey, *Preventive Detention and the Crime of Being Dangerous*, 58 Geo. L.J. 287 (1969).

the Constitution prohibits pretrial detention on the basis of uncertain predictions of future criminal behavior. *See Sellers v. United States*, 89 S. Ct. 36, 38 (1968) (Chambers' opinion of Black, J., questioning whether dangerousness is "ever" a justifiable ground for denying bail). The far narrower issue here is whether the risk of an erroneous prediction about future crime is high and whether safeguards not included in section 739(a)(ii) would be of value. To state the issue is to answer it. The proponents of preventive detention doubtless assess the risk of erroneous determinations somewhat lower than do the opponents, but on the present state of knowledge concerning predictions of criminal behavior, only the foolhardy would deny that even with carefully circumscribed decisionmaking, a significant risk of erroneous perdiction remains.

New York's statute does not include readily available limitations that would reduce the risk of error. First, the statute places no limits on the crimes for which the person subject to detention has been arrested. Even the most ardent advocates of preventive detention do not claim that commission of any crime, no matter how minor, provides an adequate basis for predicting commission of a future crime. Second, the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused. The statute authorizes pretrial detention without a finding of probable cause.[5] Third, the judge is

5. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."). Even if some standard of proof less than probable cause would suffice to justify detention for the three to six days prior to the probable cause hearing mandated for all pretrial detainees, *see* N.Y. Family Court Act § 739(b) (McKinney 1975), New York's preventive detention statute contains no standard at all.

not required to assess the individual's background; a juvenile with solid family support, no prior criminal record, and attending school or working is subject to preventive detention in the unfettered discretion of the Family Court judge, even when arrested for non-violent crimes. Fourth, the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released. Though a legislature has broad power to proscribe a variety of conduct as criminal, it does not necessarily have equivalent power to authorize pretrial detention because of the risk that the detained person might commit any of the acts, no matter how minor, for which criminal penalties have been established. Fifth, the statute does not specify any standard of proof by which the judge must be persuaded of a serious risk of future crime.[6] In marked contrast to the limitations in the well-known District of Columbia preventive detention statute upheld in *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981), the New York provision permits the judge to order detention of any juvenile accused of any crime whenever he determines that there is a "serious risk" of any future crime.[7]

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6. *Cf. Addington v. Texas*, 441 U.S. 418 (1979) (requiring standard of "clear and convincing" proof to justify civil commitment to a mental hospital); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (emphasizing importance of burden of proof when liberty of criminal defendant is at stake).

7. Even the Nebraska constitutional provision mandating preventive detention, which was declared unconstitutional by the Eighth Circuit for lack of individualized decision-making applied only to those accused of three serious crimes, treason, murder, and aggravated sexual offenses, and then only "where the proof is evident or the presumption great." Neb. Const. art. I, § 9; *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot per curiam*, 102 S. Ct. 1181 (1982).

In my judgment, the Due Process Clause forbids the exercise of such unbridled discretion to inflict a deprivation as serious as loss of liberty in advance of trial on the basis of a highly uncertain prediction of future criminal behavior.[8]

For these reasons I concur in the affirmance of the judgment of the District Court.[†]

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8. The appellees' claim of a denial of liberty without procedural due process does not assert that the New York statute lacks such traditional procedural requirements as notice and hearing. Of the five deficiencies I have noted, only the absence of a specified burden of proof concerns the type of procedural device normally comprehended within the requirements of procedural due process. Yet all of the deficiencies are procedural in the sense that they augment the risk of erroneous fact-finding, which is the risk sought to be reduced by the procedural component of due process. *Cf. Carlson v. Landon*, 342 U.S. 524, 543 (1952) (upholding the Attorney General's authority to deny bail to a narrowly described class of aliens, prior to deportation hearings, because "the Attorney General is not left with untrammeled discretion as to bail" and must "justify his refusal of bail by reference to the legislative scheme").

[†] Filed September 20, 1982.—*Ed.*

APPENDIX B

June 1, 1981 District Court Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA ex rel. GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, et al.,

Petitioners,

against

PAUL STRASBURG, as Commissioner, New York City Department of Juvenile Justice,

Respondent.

This action for *habeas corpus* and declaratory relief came on for trial before the Court, Honorable Robert L. Carter, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is Ordered and Adjudged:

1. The New York Family Court Act Section 739 (a)(ii), is unconstitutional, both on its face and as applied, in that it contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

Appendix B

2. The application for writs of *habeas corpus* for members of the petitioner class in the custody of respondent is granted and all class members in custody pursuant to Family Court Act Section 739 (a)(ii) shall be released forthwith.

/s/ ROBERT L. CARTER

ROBERT L. CARTER, U.S.D.J.

Dated: New York, New York
May 29, 1981

JUDGMENT ENTERED 6/1/81

/s/ RAYMOND F. BURGHARDT

Clerk

APPENDIX C

April 17, 1981 District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA ex rel. GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, et al.,

Petitioners,

against

PAUL STRASBURG, as Commissioner, New York City Department of Juvenile Justice,

Respondent.

[APPEARANCES OMITTED IN PRINTING.]

CARTER, District Judge

OPINION

I

Statement of the Case

This habeas corpus class action proceeding is being brought on behalf of a class of all juveniles who are being held or who will be held before these proceedings are con-

cluded in pretrial detention under N.Y. Family Court Act § 739(a)(ii) (McKinney) ("the Act"). Petitioners seek a declaratory judgment that § 739(a)(ii) violates the due process and equal protection clauses of the 14th Amendment. The case was certified as a class action in an unpublished opinion dated April 3, 1978.

In New York persons between the ages of 7 and 16 accused of various acts which would be a crime if committed by an adult are subject to the exclusive jurisdiction of the family court to be prosecuted as juvenile delinquents.[1] In the exercise of its exclusive jurisdiction over juvenile delinquents, the family court is authorized under the Act to subject an alleged delinquent to pretrial detention prior to a probable cause or fact finding determination if it determines that "there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime." § 739(ii) [sic]. The youth may also be detained because of the substantial probability that he will not appear on the return date 739 (a)(i), but this provision is not involved or challenged in this litigation.[2]

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1. For most serious crimes such as murder and arson, members of this group 13 years old and older may be prosecuted as juvenile offenders in the criminal court. N.Y. Penal Law § 10.00(18) (McKinney). This subclass, however, does not concern us.

2. N.Y. Family Court Act § 739 (McKinney) provides:

> (a) After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds [sic: phrase omitted] that unless the respondent is detained:
>
> (i) there is a substantial probability that he will not appear in court on the return date; or

(footnote continued on next page)

Appendix C

A trial on the merits occurred in March, 1980. Edward Rodriguez, a 16 year old, Juan Santiago, a 15 year old, and Jerome Basnight, a 17 year old, representatives of the class, testified in person. In addition, the files of their proceedings in the family court along with the § 739 case histories of 33 other purported members of the class were introduced in evidence. One of the case histories concerns a Vincent Harris who was not detained and accordingly is not properly a member of the class. The Attorney General contends that Victor Melendez is not properly a member of the class since he was detained pursuant to § 739(a)(i). A reading of the files does not support that contention, however. At the § 739 hearing of Melendez, the judge paraphrased the language of both § 739(a)(i) and § 739(a)(ii) as grounds for Melendez' detention. Accordingly, we will count him as properly included in the class. However, Daryl Larkin, whose case history is included in the class was detained because, in the judge's view, there was "a grave chance" that he would not return to court. (Exhibit 9A). That is the basis for detention under § 739(a)(i). In his brief the attorney general states that Larkin was detained under both § 739(a)(i) and (ii), but I read the transcript differ-

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(ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

(b) Unless the respondent waives a determination that probable cause exists to believe that he is a juvenile delinquent or a person in need of supervision, no detention under this section may last more than three days (i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists, or (ii) unless special circumstances exist, in which cases such detention may be extended not more than an additional three days exclusive of Saturdays, Sundays and public holidays.

ently. Larkin, therefore, will not be considered a member of the class. Thus, the case histories which will be studied are those of 3 named petitioners and 31 other members of the class.

In addition there was testimony concerning the family court process by Steven Hiltz, an attorney for 9 years in the juvenile rights division of the Legal Aid Society, and attorney-in-charge of its Manhattan office from 1976-1979, Hubert Benjamin, supervisor of probation in Bronx Family Court since 1968 and a probation officer for 30 years, and Judge Cesar Quinones, of the Family Court of the City of New York since 1970, who testified concerning § 739 hearings from a judge's perspective.

Michael Bigley, director of detention services of the New York State Division for Youth and Ralph E. Kelly, deputy commissioner of operations of New York City Department of Juvenile Justice, testified concerning secure and non-secure facilities and the functions of the state and city agencies in the housing of juveniles remanded after a § 739 hearing. Professor Leslie Wilkins, professor of criminal justice at the State University of New York at Albany, and Dr. Lynwood David Zinn, Director of Child Psychology at Michael Reese Hospital in Chicago, Illinois, and clinical assistant professor at the University of Chicago, testified as experts for petitioners concerning the harmful effects pretrial detention inflicts on the young and the arbitrariness and untrustworthiness of predictions that a juvenile will commit a crime in the future. Dr. Wilkins questioned whether any reasoned predictive determination to that effect could be made by a family court judge on the basis

of an intake interview and stated that the judge's subjective prognosis founded on such data would be roughly only 4% better than pure chance. Finally, Judge Margaret Driscoll of the Supreme Court of Connecticut and with 18 years on the bench testified about national juvenile standards and Connecticut procedures in respect of the pretrial detention of juveniles.

II

The § 739 Case Histories of the Named Plaintiffs and 31 Other Members of the Class

Edwin Rodriguez was arrested on December 12, 1977, and charged with arson and reckless endangerment (that he with other youths attempted to start a fire in a subway station). Rodriguez was 14 at the time and had no prior arrest record. He had a § 739 hearing on December 13, 1977, before Judge Ferrara. Probation recommended detention. He was detained on the grounds that he was charged with a serious act that occurred at 12:30 A.M., and he was not going to school. A fact finding hearing[3] was scheduled for December 15, but was adjourned to December 16. At the December 16 hearing, Rodriguez entered a plea to reckless endangerment and was released. He had been detained for a total of 3 days. At the dispositional

3. N.Y. Family Court Act § 742 (McKinney) defines "fact finding hearing" in a case of alleged juvenile delinquency as one "to determine whether the respondent did the act or acts alleged in the petition which, if done by an adult, would constitute a crime." N.Y. Family Court Act § 744 (McKinney) requires evidence to be limited to the competent, material and relevant and a finding that "respondent did the acts or acts alleged must be based on a preponderance of the evidence."

hearing[4] on June 23, 1978, Rodriguez was given 2 years probation and family counselling. There have been no subsequent court contacts. Rodriguez, as indicated, testified in person at the trial, and his § 739 case history is set out in Exhibit 12.

Juan Santiago, 12 years old with no prior court contact, was arrested on April 11, 1978, and charged with first degree assault on a 71 year old woman. The offense was alleged to have occurred at 6:00 P.M. on the street and to have resulted in injury to the woman. He was taken to Spofford (a secure facility)[5] where he was held until his § 739 hearing on April 12, before Judge Matthews. The court ordered him detained because of the seriousness of the offense and the condition of the alleged victim. A probable cause hearing was set for April 17. He had been detained for 6 days at the time of the probable cause hearing. Probable cause was found and the boy was detained at Spofford until his fact finding hearing on April 24, 1978. As a result of that hearing, he was adjudicated a delinquent

4. N.Y. Family Court Act § 743 (McKinney) defines a dispositional hearing in cases of alleged juvenile delinquency as one "to determine whether the respondent requires supervision, treatment or confinement."

5. There are two types of detention facilities—secure and non-secure. A secure facility is defined as one "characterized by physically restricting construction, hardware and procedures." N.Y. Family Court Act § 712(d) (McKinney). A non-secure facility is "characterized by the absence of physically restricting construction, hardware and procedures." N.Y. Family Court Act § 712(e) (McKinney). The secure facility has a more authoritarian atmosphere. The juveniles are subjected to strip-searches, wear institutional clothing and follow institutional regimen. At Spofford, which is a secure facility, some juveniles who have had dispositional determinations and were awaiting placement (long term care) comingle with those in pretrial detention (short term care).

and was ordered detained further at Spofford for psychological testing and investigation. At his dispositional hearing on May 19, 1978, he was released to the custody of his mother on 2 years probation. Since his release, he has had no further contact with the court. (Exhibit 13)

Jerome Basnight, 14 years old, was arrested on October 14, 1977, and charged with first degree robbery and criminal possession of a weapon. He is alleged to have acted with 2 others to steal a pocketbook at gunpoint. He was released to the custody of his mother by the police. A § 739 hearing was held on October 20, 1977, before Judge Ferrara, 6 days after the event. The boy was ascertained to be registered in school, to be a resident of Staten Island and to have no prior criminal record. The judge detained him because the matter was "quite serious," and the boy seemed involved in bad company. A probable cause hearing was held on October 24. He had been detained 4 days at the time of the probable cause hearing. Probable cause was found, and he remained in custody until a fact finding hearing on November 1. He was adjudicated a delinquent at that hearing on the robbery charge, and disposition was reserved. At the dispositional hearing on November 29, 1977, Basnight was placed on probation for one year under the supervision of the County of Richmond. (Exhibit 10) Basnight testified at trial that he was registered in McKee Vocational High School in Staten Island, and that because of the time spent in detention, he lacked the necessary points to qualify for auto shop training because he could not make up the deficiency.

Gregory Martin, 14 years old, was arrested on December 13, 1977, charged with robbery and assault with crim-

inal possession of a weapon for striking another youngster with a loaded revolver and stealing his jacket and sneakers. A § 739 hearing was held on December 14, before Judge Ferrara. Martin had no prior record. Citing the lateness of the hour when the crime occurred, that the boy had given the police a false address and the loaded weapon, the judge ordered Martin detained. At the December 19 probable cause hearing, probable cause was established. He had been detained 6 days before this hearing. The fact finding hearing held December 27-29, adjudicated Martin a delinquent and guilty on all counts. At the February 14, 1978 dispositional hearing, he was given 2 years probation. (Exhibit 11)

Luis Rosario, 14 years old, together with 4 others, was charged with an attempt on March 2, 1979, to rob two men. It was alleged that a gun was used and that Luis and his companions beat the two men about the head with sticks. Luis was released. A § 739 hearing was held before Judge Roache on March 15. At that time Luis had another delinquency petition pending for knifing a student, and two prior petitions had been adjusted. The court ordered him detained, noting his prior court appearances. Probable cause was found on March 21. On April 11, the boy was released to his father, and the case was terminated on September 25, 1979, without adjustment. (Exhibit 2)

Kenneth Morgan, 14 years old, was arrested on March 25, 1978, and charged with attempted robbery and threatening a 14 year old girl and her brother. A § 739 hearing was held on March 27, before Judge Moskoff. Kenneth was then on release status on another robbery charge. He was ordered detained. A probable cause hearing was appar-

ently set for March 30, but continued until April 4, where it seems to have been combined with a fact finding hearing. He was found guilty of harassment and petty larceny. Morgan was detained 10 days before the April 4 probable cause continued hearing, and 8 days subsequent to the § 739 determination. On July 5, at a dispositional hearing, he was ordered placed with the Department of Social Services for 18 months. (Exhibit 3)

Phil Hanna, 13, and *Calvin Jenkins*, 15, were arrested and charged with robbery and criminal trespass on August 23, 1977, for breaking into a store and damaging equipment. A § 739 hearing was held before Judge Rigler on August 24. Hanna had had prior court contacts and Jenkins, with 2 delinquency petitions pending, was on probation. Both were ordered detained. At the August 29 probable cause hearing, Jenkins and Hanna were paroled. On October 21, 1977, their cases were dismissed for lack of prosecution. They were held in pretrial detention for 6 days before the probable cause determination. (Exhibit 4)

James Price, 13 years old, was arrested on September 11, 1978, for attempting to pull a necklace from a man's neck and was charged with robbery, assault and grand larceny. A § 739 hearing was held before Judge Ferrara on September 12. Price had had prior court contacts, but the previous charges had not been pressed. He was ordered detained, the court citing his recent court contacts. A probable cause hearing was set for September 15, and at that hearing Price admitted to grand larceny and was placed in a non-secure facility. He absconded on September 27. At the time of the probable cause hearing Price had been detained for 3 days. (Exhibit 5)

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Johnny McArthur, age 15, was arrested on October 12, 1977, for pointing a loaded, cocked automatic at a 13 year old. He was charged with criminal possession of a dangerous weapon and menacing and released by the police to the custody of his mother. A § 739 hearing was held on November 28, 1977, six weeks after his arrest, before Judge Heller. He was ordered detained, the judge stating it was his policy to remand those caught with loaded .45 caliber revolvers. The probable cause hearing was scheduled for November 30, 1977, but was adjourned, and he was released to the custody of his mother. As of November 30, he had been detained for 2 days. On January 10, 1978, the matter was dismissed without prejudice. (Exhibit 6)

Christopher Cox, 13, Glen Maloney, 13 and Wade Forde, 13, were arrested on October 13, 1976, along with Clarence Smith, 13, and Alex Michael, 15, and charged with grabbing and threatening people with a weapon in an attempt to take their bus passes. They were released to the custody of their parents. A § 739 hearing was held on November 12, before Judge Roache. Smith, who had retained private counsel, was paroled as was Michael. The court ordered Cox, Maloney and Forde detained despite the intake probation officer's recommendation of parole and the fact that the three had had no prior court contact. Forde was paroled to his parent's custody on November 15, and at the November 23 fact finding hearing he was adjudicated a delinquent. Forde was placed on probation for 2 years. Cox was placed on probation on January 13, 1977, but it was subsequently revoked. Forde appears to have been held in custody for 3 days before being paroled to his

mother's care. The case history does not contain any further information. (Exhibit 7).

Francisco Ramos, 15, was arrested on March 4 for breaking into a store and stealing goods and charged with burglary, petty larceny, criminal mischief and criminal possession of stolen goods. He was released to the custody of his parents. A § 739 hearing was held on March 17, 1978, before Judge Roache. He had a record of 9 prior arrests but all had resulted in adjustments and dismissals. Probation recommended release, but Judge Roache ordered him detained on the ground that prior arrests showed a likelihood that Ramos would commit a crime before the return date. A probable cause hearing was set for March 21, 1978, but the matter was continued. The final disposition of the proceeding was a discontinuance. Ramos was apparently in custody by order of the court for some 4 days until the matter was discontinued. (Exhibit 8)

Jose Cruz, 14, was charged with attempted murder and assault based on a March 7, 1977 incident in which Cruz allegedly pushed a 77 year old man down the stairs, beat him about the head and threatened him. At a § 739 hearing on March 25, before Judge Rigler, he was ordered detained in view of the severity of the charge. Probable cause was found on March 28, at which time he had been detained 3 days. The attempted murder charge was dismissed, and he was paroled in his mother's custody on April 1. On May 25, the assault charges were reduced, and the case was adjourned in contemplation of dismissal. (Exhibit 11)

Edwin Ascencio, 14, was arrested on December 12, 1977, with Edwin Rodriguez, and charged with arson and reckless endangerment for allegedly starting a fire in a subway.

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A § 739 hearing was held on December 13, 1977, before Judge Ferrara. Ascencio had a petition pending and had not been attending school. The judge ordered detention, citing the seriousness of the allegations as a basis. A probable cause hearing was held on December 16, 1977. Ascencio admitted to committing the offense and was released to his family. He had been held in custody for 4 days, 3 of them under order of the court at the time of the probable cause hearing. At the dispositional hearing on January 26, 1978, he was placed on 2 years probation. (Exhibit 12)

James Peebles, 15 years old, was arrested and charged with arson for allegedly setting fire on July 4, 1978, outside the door of the complainant's apartment while the complainant and his family were inside. A § 739 hearing was held on July 5, before Judge Quinones. The boy was ordered detained, the judge citing the seriousness of the crime as the basis for his action. At the July 10 probable cause hearing Peebles admitted to reckless endangerment. At that time he had been in custody for 6 days. Detention was continued for psychological evaluation. On July 20, 1978, he was released to his mother. Parole status was revoked in December, 1978, and at the dispositional hearing he was placed with the Division for Youth. (Exhibit 14)

Jeffrey McCain, 15, was arrested on May 23, 1978. A § 739 hearing was held on May 24, 1978, before Judge Doran. The boy had been arrested on robbery charges on 3 prior occasions that same month, and petitions for these offenses were pending. He was ordered detained. A probable cause hearing was set for May 28, 1978, but was postponed. The matter was eventually dismissed because of lack of proof beyond a reasonable doubt to support the

charges. McCain was held in custody for at least 4 days before the scheduled May 28 probable cause hearing. The record does not disclose the date of the boy's release. (Exhibit 15)

Carl Harris, 15, and Michael Taylor, 14, were arrested on March 5, 1977, for posession of stolen property and released. A § 739 hearing was held 12 days later on March 17, before Judge Rigler. In view of prior court contacts, the court ordered both detained. On March 21, 1977, both were adjudicated delinquent. By that time they had each spent 4 days in detention. At the dispositional hearing on May 16, 1977, Carl was placed on probation and Michael with the Commissioner of Social Services. (Exhibit 16)

Victor Melendez, 15, was arrested on July 11, 1977, for breaking and entering a school building at night and causing $1,500 in damages. A § 739 hearing was held on July 13, 1977, before Judge Gartenstein. This was Melendez's fourth arrest since March, 1977. He was ordered detained. A probable cause hearing was set for July 19, but was adjourned and was finally held on August 12, 1977, at which time Melendez was adjudicated a delinquent. On December 16, 1977, he was placed on one year's probation. It is unclear from the record what part of the period from July 11 to August 12, Melendez spent in detention.[6] (Exhibit 17)

Tyrone Parson, 15, was arrested on November 6, 1976, for promoting gambling and for possession of a gambling device and released. At a § 739 hearing held on December

6. If he was in fact held in custody from July 13 to August 12 before the probable cause hearing, the statutory time constraints appear to have been breached. *See* N.Y. Family Court Act § 739(b) (McKinney).

1, he was ordered detained. Seven prior court petitions were then pending. At the probable cause hearing on December 6, the petition was dismissed because the offense alleged did not come within the provisions of the penal law. He had been detained for 5 days between his § 739 and probable cause hearings. (Exhibit 18)

Geraldo Delgado, 15, was arrested on March 4, 1976, for stabbing and killing another boy. A § 739 hearing was held on March 5, 1976, before Judge Matthews. He ordered the boy detained because of the seriousness of the crime. Probable cause was found on March 10. Delgado had been detained for 5 days between his § 739 hearing and probable cause determination. Delgado was adjudicated a delinquent on April 4, 1976, and psychological tests were ordered. On July 7, 1976, he was released to his mother's custody and placed on one year's probation subject to treatment at Lincoln Hospital Adolescent Treatment Center. (Exhibit 19)

Tony Gomez, 15, was arrested on October 26, 1978, for allegedly assaulting and robbing a 77 year old woman and charged with grand larceny, robbery, assault and possession of stolen property. A § 739 hearing was held on October 27, 1977, before Judge Ferrara. He was ordered detained. Three prior petitions for robbery and attempted rape had been terminated without adjustment. A probable cause hearing was scheduled for October 31, but was adjourned. Gomez was released on a writ of habeas corpus on November 10, 1977. At the time he had been held in custody without a probable cause adjudication for 15 days, 14 of those days were pursuant to the court's order under § 739(a)(ii). On December 7, 1977, he was adjudicated a

delinquent and given a one year suspended sentence. (Exhibit 20)

Maurice Dunaway, 13, was arrested on July 22, 1976, for theft of subway bus transfers from a Transit Authority transfer box. A § 739 hearing on July 23, 1976, was held before Judge Roache. The boy was ordered detained due to alleged threats against the complainant, disobedience at home and prior court contact. Another petition for a similar offense was outstanding. A probable cause hearing was set for July 27, but was adjourned to August 3. On the latter date Dunaway was adjudicated a delinquent. He had been detained for 11 days under court order at the time of his probable cause hearing on August 3. Thereafter he remained in custody until October 12, 1976, and then was released to his mother while placement was explored. On April 20, 1977, he was placed with the Division for Youth for 18 months. (Exhibit 21)

Daniel Nelson, 15 was arrested on April 19, 1979, charged with petit larceny for allegedly stealing a radio valued at $85, and released to the custody of his parents. A § 739 hearing was held on May 3, 1979, before Judge Roache. At the time, Nelson was on probation on a prior charge and was ordered detained. The probable cause hearing was held on May 6, and he was adjudicated a delinquent. At the time of his probable cause hearing he had been detained for 3 days. On December 12, he was placed with the Commissioner of the Department of Social Services for 18 months. (Exhibit 22)

Daniel Gregoire, 15, was arrested on August 23, 1977, on charges of burglary and criminal possession of stolen property. A § 739 hearing was held on September 20, 1977,

before Judge Roache. Six prior delinquency petitions against this juvenile had been dismissed. His father told the judge that he could not control the boy and did not want him home. He was ordered detained and remained in custody until September 23, 1977, when he was paroled to his brother. Probable cause was found on September 29, and at the dispositional hearing he was placed in St. Vincent's for 18 months. Gregoire had spent a total of 3 days under court ordered detention. (Exhibit 23)

Carlos Lopez, 13, was arrested on August 30, 1977, for breaking and entering a store at 4:00 A.M., and was charged with burglary, petit larceny and criminal mischief. A § 739 hearing was held on August 31, 1977, before Judge Rigler. He was ordered detained because of family problems and five pending petitions. A probable cause hearing was set for September 6, 1977. On September 9, he absconded, was returned and absconded again on September 22, 1977, and again was returned. On November 10, 1977, the case was adjusted in contemplation of dismissal. It is difficult to ascertain the precise number of days this juvenile was detained, but it seems to have been at least 7 days before the probable cause hearing. (Exhibit 24)

Kevin West, 14, was arrested on May 31, 1971, and charged with grand larceny, jostling and resisting arrest, for taking property from a 71 year old woman and striking the arresting officer. The § 739 hearing was held on June 1, 1979, before Judge Matthews. Several outstanding petitions were then pending. West was ordered detained. On June 5, he was adjudicated a delinquent and placed with the Division for Youth for 12 months. His time in detention under court order before his probable cause hearing was 4 days. (Exhibit 25)

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Carlos Fargas, 14, was arrested on April 24, 1979, for threatening to strike the complaining witness with a broomstick. He was charged with robbery, grand larceny, unlawful imprisonment and possession of stolen property. He was released pending a § 739 hearing which was held on June 6, before Judge Pollard. The failure of his parents to accompany him to court meant a lack of supervision to the judge and created a likelihood of further delinquent acts. For these articulated reasons he was detained. On June 11, he was paroled to the custody of his parents. He had been in pretrial detention under court order for 5 days. (Exhibit 26)

Jody Allen, 12, was arrested on May 25, 1979, for beating an elderly woman who had to be hospitalized. There had been seven previous court contacts but no findings. He was charged with assault and attempted robbery and released. The § 739 hearing was held on June 1, before Judge Pitaro. He was ordered remanded. The complaining witness did not prosecute the matter. Allen was released to the custody of his grandmother on June 4. He had been detained under court order for 3 days before being released. The petition was withdrawn on June 25. (Exhibit 27)

Emmett Jacobs, 14, was arrested for stealing a watch on May 30, 1979, and charged with robbery and grand larceny. A § 739 hearing was held on May 31, before Judge Leddy. Three prior petitions had been filed, but no findings had resulted. Noting his prior court contacts, the court ordered Jacobs detained. At the probable cause hearing on June 4, Jacobs admitted to petit larceny. At final disposition he was placed with the Division for Youth

for 12 months. He had been detained 4 days before his probable cause adjudication. (Exhibit 28)

James Ancrum, 15, was arrested on August 16, 1979, for attempting to take a necklace off a man's neck. The man was allegedly beaten and thrown down a flight of stairs. A § 739 hearing was held on August 21, before Judge Ferrara after an order was issued removing the case from criminal court. Probation recommended release, but Ancrum was ordered detained, in view of the lateness of the hour when the act was allegedly committed. On August 24, probable cause was found. He was released to his mother's custody, and the petition was withdrawn. He was detained for 3 days under court order before the probable cause hearing. (Exhibit 35)

Douglas McLaughlin, 14 years old, was arrested on June 29, 1978, for burglarizing an apartment. Apparently he was on parole between the incident and the § 739 hearing on July 7. He had been arrested once previously, though no petition had been filed. The § 739 hearing was held before Judge Quinones, who ordered the boy remanded due to a statement by the boy's mother that he was beyond her control. A fact finding hearing was set for July 11, then adjourned until July 13, at which time McLaughlin was released to the custody of his mother. He was detained under court order for 6 days before the probable cause hearing. The petition was ordered dismissed on January 12, 1979. (Exhibit 43)

Appendix C

III

Juvenile Delinquency Proceedings

The threshold step in the court process in juvenile delinquency proceedings occurs at probation intake in family court. The juvenile may be brought to the intake part from temporary detention or in police custody, in which case he comes to the court in handcuffs and under police escort. The juvenile may have been released to the custody of his parent or guardian, with instructions to appear in court at an appointed time. N.Y. Family Court Act § 741 (McKinney). In these cases the juvenile appears on his own at probation intake, usually accompanied by a parent or relative. If the complainant appears, and it is the court's understanding that, more often than not, the complainant is a police officer, the case is assigned to a probation intake officer. If no complainant appears, a new date is set, and if after several continuances the complainant still does not put in an appearance, the non-felony proceedings are terminated. If a felony, the case is referred to the district attorney.

The intake probation officer must hold either a master's degree in social work or in sociology and related fields or such a bachelor's degree, plus two years of paid-for experience in social work and related fields. Many of the probation officers currently on duty in probation intake possess only the lower academic credentials augmented by relevant work experience.

The probation officer to whom the case is assigned interviews the police officer, the juvenile and parent or guard-

ian, if present. Typically, the civilian complainant signs a statement at the police station and does not appear at probation intake. The juvenile is not represented by counsel. The purpose served by these interviews is to enable the probation officer to ascertain the nature of the offense charged, to obtain the juvenile and the police version of what took place, to assess the juvenile's role and personal involvement in the offense and to secure some background facts on the child. The juvenile is not subjected to any professional psychiatric or psychological examination unless mental health problems are patently evident. The entire interview process takes between 10 and 40 minutes. After the interviews are concluded, the officer checks to ascertain whether the juvenile has a history of prior involvement with the court. He then decides whether the case should be adjusted, that is, disposed of without court intervention. He may adjust the case, leaving it open to see whether the juvenile lives up to the conditions imposed with a view to having the case ultimately dismissed. Whether the case is adjusted or referred to court intake for further proceedings is determined based on criteria set forth in Family Court rules and the regulations in the New York State Department of Probation. N.Y. Family Court Act § 734(a) (McKinney); Family Court Rules, §§ 2507.3-2507.6.

If the officer decides that the case must be processed through court, the case is sent to court intake for a petition to be drawn and prosecution by the district attorney or corporation counsel. N.Y. Family Court Act § 731(i) (McKinney). When the probation officer decides to refer the matter to court intake for the drafting of a petition and

further proceedings, he must accompany the reference with a recommendation that the juvenile either be remanded or paroled. This recommendation is based on the nature of the case, whether there is a prior record, the attitude of the juvenile and of the parent.[7] There do not appear to be any governing criteria which must be followed by the probation officer in choosing between proposing detention and parole, nor do psychological or psychiatric factors appear to be considerations involved in the probation officer's recommendations.

Although the court was advised at trial that the corporation counsel is increasingly demanding that petitions be based on the statement of a complainant with personal knowledge of what took place, we were nonetheless advised that petitions based solely on information and belief are still being processed.

If in custody, the juvenile must be brought before a judge for a § 739 hearing within 24 hours. The judge may order him held for an additional 24 hours before holding the § 739 hearing. If the hearing results in pretrial detention, a fact finding hearing, which is equivalent to a trial on the merits, must occur within 3 to 6 days thereafter. N.Y. Family Court Act § 747 (McKinney). In some cases fact finding may be put off for good cause as long as 14 days after the § 739 proceeding, but if such a postponement occurs, there must be a probable cause hearing within 72 hours of the § 739 determination. N.Y. Family Court Act § 748 (McKinney)

7. In certain designated felony cases, the officer makes no recommendation about release or parole but merely summarizes the record in the case. (Tr. 72).

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The § 739 hearing takes place at court intake and is similar to an arraignment in an adult case. The juvenile is brought before the judge and assigned counsel. The charges are read, and the juvenile is advised of his rights. N.Y. Family Court Act § 739 (McKinney). In addition to the juvenile and assigned counsel, the prosecutor, court liaison officer and probably a parent or guardian are also present. The court liaison officer is the probation officer on duty at court intake. He is not the probation intake officer who interviewed the juvenile and whose recommendation to remand or parole the judge will act upon. There is an official stenographic transcript of this proceeding, but no inquiry is made into the non-hearsay allegations of the truth of the charges, and no testimony is taken under oath. After the charges are read and the juvenile is advised of his rights, the judge asks for the recommendation from probation intake. This is read to him by the court liaison officer. The judge may make a few inquiries of defense counsel, prosecution and court liaison officer. Then he announces his decision whether to order detention or parole the juvenile. He usually gives some indication on the record of his reasons for ordering pretrial detention.

Each judge follows his own individual approach to this determination. Judge Cesar Quinones, the only judge of family court to testify, stated that his determinations are based on the petition, prior record and the probation officer's recommendation. He also considers whatever facts are brought out by defense counsel, but appointed counsel (the usual case) is assigned at court intake when the case is called and has very little opportunity to learn much per-

tinent information about the juvenile. Background on the child is not available at the court intake unless there has been prior court contact, and if the latter, this is a negative factor. Often there is no one present with personal knowledge of what happened.

Judge Quinones stated that he considers allegations of violence against persons more serious than property infractions; that he looks to the seriousness of the charges, whether anyone was hurt, whether the acts occurred in early morning which would be indicative of lack of parental supervision. He testified that a § 739 determination to detain the juvenile is not intended to benefit the child, but to protect society. At court intake, Judge Quinones testified, approximately 30 cases are processed in a typical 9-5 day, thus each proceeding is of 5-15 minutes in duration. The great majority of juveniles ordered detained are blacks and Puerto Rican. No uniform court or judicial criteria, yardstick or guidelines govern a § 739 disposition. In deciding whether the juveniles should be detained, each judge must rely on his own subjective judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute. (Tr. 435-513).

At the fact finding hearing, a determination is made whether the juvenile is to be adjudged delinquent because he is found to have committed the offenses charged, or, as in the typical case, a lesser offense than that originally charged. Where a probable cause hearing precedes fact finding, there must be a sufficient prosecutorial presentation to warrant a finding of probable cause that the juvenile

committed the offense charged, and, as the case files show, these probable cause and fact finding proceedings often result in an admission by the juvenile that he committed a lesser offense. If the fact finding hearing results in an adjudication of delinquency, the juvenile has a dispositional hearing, at which time the judge determines what form of punishment or discipline is warranted. The dispositional hearing determines whether the juvenile is to be sent to a state facility, secure or unsecure, or released on probation. N.Y. Family Court Act § 753 (McKinney). Probation prepares a report for the judge at disposition which is compiled after a full investigation of the juvenile in school, community and home and a study of relevant intake records.

In 1979, 58.2% of the juveniles held in pretrial detention[8] were accused of crimes against property and other

8. There was considerable testimony concerning the type of facility to which a juvenile is remanded for detention prior to dispositional hearing. Michael Bigley, director of detention services section, New York State Division for Youth, testified that detention is short term care which may last through dispositional stage pending final placement. Long term care commences at placement pursuant to a dispositional determination. He testified that in 1978, in New York City there were 7,362 initial admissions (of both juvenile delinquents and juvenile offenders) to secure facilities and 50% of the juvenile delinquents admitted to those facilities were there for 3 days or less (Tr. 206-07). In 1979, there were 1,216 admissions of juvenile delinquents to non-secure facilities (Tr. 211-12). In 1979, a total of 8,557 juveniles were admitted to secure facilities; 2,428 whites, 4,501 blacks and 1,386 hispanics. (Tr. 222).

The testimony appears to be at odds with the final figures set out in the Report of Chief Administrator (Tables 79, 80, 81, 82) for the calendar year 1979, *see* text pp. 55a-56a. If we include all of those detained adding those detained before petition to the figures given for those detained after petition, and include placement with the Commissioner of Social Services, Title 2 and Title 3 placements with the Division for Youth as placement in secure facilities, the total 4,783 does not coincide with 8,557, the figure given by Mr. Bigley at trial.

non-violent crimes; 47.1% were accused of crimes against persons and other violent crimes. In 1977, 18,447 juvenile delinquency petitions were disposed of. Pretrial detention was ordered in 3,546 instances.[9] At final disposition 47 juveniles were subjected to some form of restricted placement and 594 were placed in Division for Youth under Title 2, and 667 were placed with the Division under Title 3.[10] The latest published statistics are for the year 1979. There were 17,880 juvenile delinquency petitions filed in the state.[11] Pretrial detention was ordered in 4,290 cases.[12] Of the petitions filed, 932 were dismissed at fact finding;[13]

9. Table 81 and Table 82, pp. 162-165, 1977 Annual Report for 1977 of the Administrative Board of the Judicial Conference and Office of Court Administration of the State of New York (1978), show that 347 juveniles were detained before the filing of the petition, and 3,546 were detained between the filing of the petition and disposition. If the latter figure does not include the former, as the text assumes, the number of juveniles subject to pretrial detention would be 3,793.

10. Tables 83 and 84, pp. 166-169. N.Y. Executive Law § 502 *et seq.* (McKinney), authorizes the Division for Youth to establish youth centers—camps, residences or other buildings for the care, treatment, education, rehabilitation and guidance of youth between 15 and 18 years of age. The program may include training and service in conservation, civil defense, disaster relief, etc. Youths assigned there may be there only part time. It is to such centers that Title 2 placement refers.

Title 3 placement is provided for in N.Y. Executive Law § 510 *et seq.* (McKinney), and these are training schools operated by the Division for Youth for juvenile delinquents under the age of 16 at the time the delinquent act is committed and under 17 at the time of placement. These schools are authorized to offer general rehabilitation programs.

11. Tables 79 and 80, pp. 86-87, Report of the Chief Administrator of the Courts for the Calendar Year 1979, State of New York (1980).

12. *Ibid.*

13. Tables 81 and 82, pp. 88-89, Report of Chief Administrator of the Courts, *op. cit. supra* note 11.

23 were dismissed for other reasons and 292 at the dispositional hearing;[14] 731 were dismissed for failure to prosecute;[15] 846 were dismissed without prejudice;[16] 4,882 were dismissed in furtherance of justice,[17] and 1,617 were dismissed for other reasons;[18] 1,456 petitions were withdrawn;[19] 19 were discharged with warnings;[20] in 725 cases judgment was suspended;[21] 3,511 were placed on probation without placement;[22] 17 were placed on probation and placed in private homes;[23] 760 were placed with the Commissioner of Social Services;[24] 412 were placed with the Division for Youth under Title 2;[25] 594 were placed with the Division under Title 3;[26] 2 were placed in restrictive placement for 5 years, 2 for 3 years and 70 in other forms of restricted placement.[27]

IV

The Parties' Contentions

Petitioners contend that the statute is unconstitutional on its face and as applied in that it offends the due process

14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*

and equal protection guaranties of the 14th Amendment. Petitioners argue that the subjective prediction or prognosis of the imminence of future misconduct which § 739 (a)(ii) authorizes as the basis for the pretrial detention of juveniles is a vague, arbitrary and capricious standard and that no rationally based prediction or reasoned determination is possible under the statutory scheme. They insist that the statute is overbroad and violates equal protection constraints in authorizing pretrial detention of juveniles, since they are thereby treated differently from adults, and there is neither a rational basis pertinent to the differentiation between the two groups, nor any compelling state justification to warrant imposition of the restrictions imposed on juveniles under the statutory scheme. Petitioners also argue that the burden the statutory scheme imposes falls more heavily on non-white minorities and the poor than on whites and the more affluent, but they stop short of making a specific claim of a denial of equal protection on that basis.

The attorney general argues *pro se* that the statutory scheme is constitutionally and legislatively permissible; that all judicial and administrative decision making in the criminal justice system has the same potential for inaccuracy in predicting future acts, as does the statute involved here, but nonetheless the judge's subjective determinations as to bail, parole, and length of sentence have been accepted as appropriate exercises of judicial discretion free of constitutional infirmities; that the statute does not result in random detention; that pretrial detention does not constitute punishment without trial and does not deny juveniles any due process or equal protection rights, and in any event,

the compelling interest of the state in reducing the risk of pretrial crimes by juveniles justifies the difference in the treatment of juveniles and adults and validates the statute.

V

Determination

A

The issues raised in this litigation are difficult and complex. Petitioners contend that the statutory scheme is at war with the guarantee of equal protection since juveniles are subjected to pretrial detention while adults are not. Both parties argue that the appropriate test to measure the constitutional validity of § 739(a)(ii) under the equal protection clause is whether the state has demonstrated a compelling, overriding state interest justifying the legislation, and no feasible, less drastic measures are appropriate to accomplish the state's objective.

In *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518 (1976), the New York Court of Appeals unheld the Act against an equal protection challenge on the ground that the statute served a compelling state interest. That interest as articulated by the court was the juveniles' emotional and intellectual immaturity, necessitating that they not be held to the more onerous adult standards of responsibility for their conduct. Moreover, the court reasoned that immaturity and lack of comprehension caused juveniles to view criminal conduct less seriously than adults. Accordingly, procedures designed to prevent further criminal

acts by juveniles accused of delinquency were held to be justified to protect the public.

If the parties are, and the state court was, correct that compelling justification and unavailability of any feasible less drastic alternatives are the criteria to measure the statute's validity under the equal protection clause, my task would be considerably eased. § 739 clearly cannot withstand a constitutional challenge when the equal protection test of strict scrutiny is applied.

The record made at trial reveals that roughly 3,546 juvenile delinquents were subjected to pretrial detention in 1977. The figures on final disposition of all juvenile delinquencies show that 667 were placed in training schools of the Division for Youth and 47 others were accorded some other form of restricted placement. Assuming that the above 714 juveniles were all among those subjected to pretrial detention (an assumption not necessarily correct), the remaining 2,832 cases resulted in probation to the custody of the parent, guardian or placement in a foster home, or placement in a youth camp.

The 1979 figures paint the same picture. Some 17,880 juvenile delinquency petitions were filed. 4,290 juveniles were held in pretrial detention; 670 were placed with the Commissioner of Social Services, 412 with the Division for Youth under Title 2; 594 with the Division for Youth under Title 3, and 77 were accorded some form of restricted placement. (*See ante,* pp. 55a-56a). Assuming again that all of these 1,753 were subjected to pretrial detention, the result is that more than half such cases resulted in some form of dismissal or probation. Under any yardstick when at final

disposition the overwhelming majority of juveniles are paroled and sent home, the claim that there is a compelling need to subject them to pretrial detention becomes hard to credit.[28]

Sixteen juveniles in the case file histories which make up the record in this case were on parole from 5 to over 30 days between the time of the commission of the offense and their § 739 hearing, with no evidence that in the interim any further crimes had been committed. Yet they were remanded. In some cases there had been no prior court contact, and parole was recommended. Nonetheless, detention was ordered. These instances show a clear lack of any compelling justification in the application of the statute. If a juvenile has been on parole a month, two weeks or 5 days without committing another crime, unless family courts are assumed to be sorcerers who can foretell future events, it is difficult to understand the rationale for depriving him of his freedom because of the likelihood that he will commit a crime within 3 to 6 days. Such decisions, under any circumstances would seem to constitute abuse of discretion.

It is, of course, clear that neither the 14th Amendment nor the Bill of Rights' strictures protect only adults. *In re Gault*, 387 U.S. 1 (1967). Moreover, the mere recitation of benign, compensatory purposes is not an automatic shield which protects against inquiry into the actual impact of a statutory scheme, *Weinberger v. Wiesenfeld*, 420 U.S.

28. I admire the candor of Michael Bigley, who, on being asked whether he would consider pretrial detention probably unwise if the ultimate disposition was parole to the youth's own home or to a foster home, replied that he would not say it was probably unwise but that it was possibly unwise. (Tr. 261).

636, 648 (1975), and in its application demonstrated on this record, there has been no articulation of the *parens patriae* thesis as justification for exercise of the court's authority under § 739(a)(ii).

Remand has been deemed warranted in this case because of the seriousness of the crime, because of prior court contact, because the court always orders detention in certain cases, because such is warranted to punish the juvenile or, as Judge Quinones testified, to protect the public. Yet restraints of minors which might be considered impermissible if applied to adults have been justified as furthering an appropriate state interest, *see e.g. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102-103 (1976) (Stevens, J., dissenting), and *parens patriae*, while not an unlimited justification, *Kent v. United States*, 383 U.S. 541, 555 (1966), has been the underlying validating basis for a state's special treatment of the young. The high minded purposes of the juvenile justice system and the designation of proceedings involving juveniles as civil, rather than criminal, serves a benign social function, but "serious questions [arise] as to whether the actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults." *Kent v. United States, supra* at 555.

Yet, in no case has the United States Supreme Court subjected a juvenile classification to the strict scrutiny for classifications based on race, *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-2 (1964), alienage, *Oyama v. California*, 332 U.S. 633, 664-66 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944);

Hirabayashi v. United States, 320 U.S. 81 (1943), or where the right or interest interfered with is characterized as fundamental, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), or struck down the differentiation between the treatment of juveniles and adults because the criteria applicable to the above classification were not met.

This provision seems to lack the high minded purpose of protecting the juvenile which is the objective generally cited to justify deviations from adult standards in the juvenile justice system. Rather, the purpose seems to be to protect society from the juvenile. No articulated rationale has been set forth on this record which would warrant disadvantaging the young on this ground. Nonetheless, I regard the equal protection challenge to the statute as insubstantial.

The right of a state to differentiate between adults and minors is too ingrained in the fabric of the law for such classifications at this late date to be held to the test of strict scrutiny. Even though a pretrial detention interferes with the juveniles' personal liberty, that alone would not seem to warrant application of the strict scrutiny test. *See e.g. Bell v. Wolfish*, 441 U.S. 520 (1979). The more appropriate inquiry is whether § 739(a)(ii) can be justified on grounds of rationality, *see Weinburger v. Salfi*, 422 U.S. 749 (1975), and under this less rigorous yardstick, the statutory scheme would qualify as meeting the constitutional requirements of equal protection. Equal protection guarantees deal with invidiously discriminatory classifications and differentiations. This statute does differentiate between youth and adults but to paraphrase Justice Powell, concurring in *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978),

to subject § 739 to a compelling state purpose inquiry would cast doubt on the network of laws that the states have devised to deal with problems of the young—delinquency, neglect and care. Accordingly, I turn to what I regard as a more substantial challenge to the statute.

B

The statutory scheme curtails the freedom of one presumptively innocent, albeit a juvenile, on the prediction or hunch of a judge that unless held in custody he will commit another crime within 3 to 6 days. The more fundamental consideration, therefore, is whether on its face or as applied, § 739(a)(ii) meets due process standards. There is little doubt that due process is a requisite to the constitutional validity of proceedings which may result in the curtailment of a juvenile's freedom, since all "individuals possess a liberty interest in being free from physical restraint." *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 33 (1979) (Marshall, J. dissenting). While the limits of the liberty interest protected from deprivation without due process have never been precisely defined, it has "always been thought to encompass freedom from bodily harm and punishment. *See Rochin v. California*, 342 U.S. 165 (1952). It is fundamental that a state cannot hold and physically punish an individual except in accordance with due process of law." *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977).

Juvenile proceedings which may result in confinement to state institutions because of alleged misconduct must have the essential ingredients of fair treatment. *In re Win-*

ship, 397 U.S. 358, 359 (1970); *In re Gault*, 387 U.S. 1, 18, 19 (1967); *In the Matter of W & S*, 19 N.Y.2d 55, 277 N.Y.S. 2d 675 (1966). Application of due process standards may not be defeated because of the labels attached by the state to the pertinent proceedings, *In re Gault, supra*, 387 U.S. at 50-51; *In re Winship, supra*, 397 U.S. at 366, and a "claim that the traditional requirements of due process are applicable in the context of pretrial detention" has not been foreclosed. *Gerstein v. Pugh*, 420 U.S. 103, 127 (1975) (Stewart, J. concurring).

The predictive § 739 determination is made before any proceeding, either adversarial or neutral, has found probable cause or rendered a determination on the merits that the juvenile committed the delinquent act charged. The Act violates due process requirements because: (1) it gives the judge a license to act arbitrarily and capriciously in a § 739 prediction of the likelihood of future criminal conduct which cannot result from a reasoned determination, (2) pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process, and (3) in addition, constitutes punishment that is constitutionally impermissible under the due process clause.

1. The first defeat is perhaps the most pernicious. The judge is empowered to make a prediction about the probability of an individual committing a crime if released. No guidelines for making that determination are set out in the statute, and none has been adopted by the court. The judge's determination is moored to no concrete or reasonably determinable yardsticks. We were advised at trial that each judge utilizes his own personal standards. Ac-

cordingly, there can be no uniform application of § 739, since each judge's subjective views and biases must necessarily govern. The whole process is riddled with subjectivity and caprice and confers upon the judge "a license for arbitrary procedure." *Kent v. United States, supra* at 553.

A judge is not an expert criminologist and even these professionals who have studied more about an individual's criminal propensities than the rest of us confess, as we shall see later, an inability to perform the task § 739 imposes on the judge. Thus, "[a] serious question of procedural due process is raised by this feature of standardless discretion, particularly in light of the hazards of prediction . . ." *Zablocki v. Redhail*, 434 U.S. 374, 402 n.4 (1978) (Powell, J. concurring). Moreover, the judge is accorded total and unbridled discretion since effective review is not possible, *see New York ex rel. Wayburn v. Schupf, supra.*[29]

Although the probation intake officers are required to follow established criteria in determining whether to adjust a case or pursue it through the courts, they make their recommendations whether to release or remand the juvenile based on "whether they feel a child may be a calculated risk if returned to the community." (Tr. 161). Thus, as the study undertaken by Professor Wilkins referred to in

29. The short span of pretrial detention makes effective review impossible. Detention is over before the appellate review can be obtained. In *New York ex rel. Wayburn v. Schupf*, and, in this case, motions to dismiss on grounds of mootness were denied because to hold otherwise would have meant insulating § 739 from constitutional challenge. Nonetheless, in reality no juvenile ordered into pretrial detention can test the validity of that adjudication while he is being held in custody pursuant thereto.

his trial testimony demonstrated, juveniles under such circumstances may have their liberty curtailed because they possess "characteristics that annoy" the parole officer or judge, or because they may be viewed as "uncooperative." (Tr. 317). It is clear that the judge decides on pretrial detention for a variety of reasons—as a means of protecting the community, as the policy of the judge to remand (Exhibit 6a, p.3), as an express punitive device (Exhibit 42, p. 11), or because of the serious nature of the charge. (Tr. 465, Exhibit 13a, p.3), among others.

Probation intake cannot undertake a thorough investigation of the youth. The probation officer learns what delinquency is charged. This may be only marginally helpful because as a general rule the original charge is considerably reduced or modified after a probable cause or fact finding hearing.[30] He evaluates the case on the facts presented by the police officer and the juvenile. He ascertains whether the juvenile has had any prior court contacts and the nature of those contacts. He is not equipped to make any sophisticated or in depth evaluation of the charges or the child, particularly in light of time constraints. If the family court guidelines require him to process the case through the court, he must recommend, on the limited information provided, whether the juvenile should be detained or paroled.

30. Justice Stevens dissenting in *Baker v. McCollan*, 443 U.S. 137, 154 n.13 and accompanying test (1979), pointed to a study of the District of Columbia, Brosi, *A Cross-City Comparison of Felony Processing* (1979) which showed that 49% of those arrested are never tried at all, with all charges being dropped before trial, and another study, Kamisar, LaFave and Israel, *Modern Criminal Procedure* (1974) which states that nationally 40% of all adults arrested are released without charges being filed.

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While the time of probation intake is limited, there is considerably more time available than the judge may allocate. The judge has no opportunity to interview the juvenile. Whatever he hears in opposing remand comes from counsel for the juvenile. If counsel is court appointed, and this is the typical case, he takes on responsibility for the proceedings only moments before convincing reasons must be presented to the court for not ordering pretrial detention. The judge has roughly 5 to 15 minutes to determine whether there is the likelihood that the juvenile would commit another crime before the return date if released.

At trial, plaintiff's expert, Professor Leslie Wilkins, stated that he would be surprised if recommendations based on intake interviews were better than chance and assessed the judge's subjective prognosis about the probability of future crime as only 4% better than chance—virtually wholly unpredictable. He testified that no method had yet been devised which could predict with any acceptable degree of accuracy that a juvenile shall commit a crime, particularly the commission of an offense in a short space of time, as the judge must do in making his § 739 decision.

A review of the literature supports Professor Wilkins' observations and shows that no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime.

As one of the leading scholars on the issue has put it:

> [t]he ability to predict which juveniles will engage in violent crime, either as adolescents or as adults, is very poor.

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> The conclusion . . . that "there has been no successful attempt to identify, within . . . offender groups, a subclass whose members have a greater than even chance of engaging again in an assaultive act" is as true for juveniles as it is for adults. It holds regardless of how well trained the person making the prediction is—or how well programmed the computer—and how much information on the individual is provided.

J. Monahan, The Prediction of Violent Behavior in Juveniles, 10-11 (paper presented at National Symposium on the Serious Juvenile Offender in Minneapolis, Sept. 19-20, 1977) (emphasis deleted), quoted in Feld, Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions, 62 Minn. L.Rev. 515, 541-42 (1978).

Moreover, not only does it appear that one cannot predict dangerousness with an acceptable degree of accuracy, but, to the extent that dangerousness can be predicted at all, there is a substantial problem of overprediction, that is, to identify persons potentially dangerous who, if subsequently released, would engage in no further violent or even criminal behavior. If a true positive is a person, who is predicted to and in fact engages in such behavior, then a false positive would be someone predicted to be dangerous but who would not engage in violent or criminal behavior. Thus, overprediction can be expressed in terms of the ratio of false positives to true positives.

Monahan also found that

> violence is vastly overpredicted whether simple behavioral indicators are used or sophisticated multi-

variate analyses are employed, and whether psychological tests are administered or thorough psychiatric examinations are performed.

J. Monahan, *supra*, quoted in Schlesinger, The Prediction of Dangerousness in Juveniles: A Replication, 24 Crime & Delinquency 40, 47 (1978).

The literature on the prediction of dangerousness, distinguishes two methods for anticipating future behavior: *clinical* prediction,[31] on the one hand, and statistical or actuarial prediction,[32] on the other.

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31. Clinical Prediction

In the face of the literature about clinical predictions, it would be impossible to be sanguine about relying on clinical methods. Feld, *supra* at 543, asserts that, "In view of the uncertainties and inconsistencies typically associated with social science research, the clear-cut superiority of actuarial methods over clinical methods is startling." Other researchers, Hermann Mannheim and Leslie Wilkins reported that their use of statistical prediction techniques proved to be twice as accurate as clinician's "intuitive" judgment. *See* Koerin, *supra* at 53, *and see* Tr. 314, and Wilkins, *passim*, Tr. 314-384. In light of the universal pessimism concerning the prospects of making accurate and discrete predictions of future criminal behavior using statistical methods, and the latter's recognized "clear-cut" superiority over clinical methods, the clinician must be disheartened.

Schlesinger, *supra*, noted the disparity between the general claim that prediction of violence was futile, on the one hand, and the claims of 9 studies, on the other, purporting to make such predictions of violent behavior in children. Employing 30 factors identified amongst the 9 studies, Schlesinger attempted to predict violent behavior in 122 children, based on their presentence evaluations from family court in California. He found a very low incidence of violent behavior among the juveniles—only 5.7%; no significant relationship among the predictor variables, clinician's recommendations and criterion behaviors; and no significant relationship between predictions of dangerousness and subsequent violent behavior.

Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers L. Rev.

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32. Footnote appears at page 73a.—*Ed.*

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(footnote 31 continued)

1084, 1094-1101 (1976), reported on their study which followed up criminal defendants who had been found incompetent to stand trial in New York City. These defendants had been evaluated by psychiatrists to determine the defendant's dangerousness, although no definition of that term was provided. The difference in assaultive behavior between those diagnosed as dangerous and those not so diagnosed was found not to be statistically significant. The authors concluded that the study presented clear and convincing evidence of the clinicians' inability to predict assaultive behavior. *Id.* at 1098-99. *See also* Dix, *Clinical Evaluation of the Dangerousness of "Normal" Criminal Defendants*, 66 Va. L. Rev. 523, 542-44 (1980) (reviewing Cocozza and Steadman study). Examination of leading studies is said to confirm the inadequacy of evidence of the accuracy of clinical assessments. *Id.* at 544.

Those studies that indicate that it may be possible to develop reliable clinical methods of prediction also indicate how unlikely it would be for the family court judge's evaluations to be reliable. In *The Clinical Prediction of Dangerousness*, 24 Crime And Delinquency 28 (1978), Cohen, Groth and Siegel reviewed the literature criticizing clinical predictions and discussed two newer studies (Kozol, Boucher and Garofalo studying male sexual offenders over a ten-year period, and Hodges studying dangerous offenders over a three-year period) and concluded that these studies show "considerable improvement over the statistical studies. . . The two studies demonstrate, we believe, that a conclusion about our capability of predicting dangerousness is premature." *Id.* at 35.

In *The Diagnosis and Treatment of Dangerousness*, 18 Crime & Delinquency 371 (1972), Kozol, Boucher and Garofalo reported on a ten-year study of almost 600 convicted male offenders, most of whom had committed a sex crime, compounded in some cases by extreme violence. On the basis of the initial diagnosis, the authors concluded that more than half of the subject offenders were not dangerous. Of these, 8.6% of those who were released subsequently committed "serious assaultive crimes." After receiving treatment for an average period of 43 months, 82 additional patients were recommended for release. Of these, 6.1% subsequently committed serious assaultive crimes. Another 18 patients were released against the clinicians' advice after treatment for an average period of 30 months with a recidivism rate of 27.8%.

The Hodges study, reported in Cohen, et al, at 35, followed up on 447 dangerous offenders for three years, and found that of those recommended by the clinical staff for incarceration who were not incarcerated by the court, 81% subsequently committed another offense

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(not necessarily a violent crime). Of those committed to the treatment center but later released against staff recommendations, 71% committed a new crime, but of those committed and later released on the staff's recommendations, only 37% were later arrested for a new crime.

These newer studies do not show that a family court judge could make reliable predictions. Rather, by highlighting what is required for a reliable clinical prediction to be made, they show why the judge could not be expected to make reliable evaluations along clinical lines. As a preliminary matter, each of these newer studies ranged over a population that was in some respect selected before the clinicians began their work. The offenders studied were a small portion of the total inmate population. Thus, it is unclear how well these results could be generalized to the situation of the family court. In particular, since, on actuarial grounds, the fact that these individuals studied had been convicted makes it more likely that they will be "dangerous." The same cannot be said of the juveniles who were detained, or who risk detention, before trial. Moreover, each of the studies involves an initial classification by the clinical staff on the basis of which a substantial number of offenders are recommended for release. (In the Kozol, et al study, *supra*, over half were so released.) Even this initial diagnosis is, in terms of its depth, detail and sophistication well beyond what could be hoped for in the family court setting. In Kozol, *supra*, the initial diagnosis "is based on clinical examinations, psychological tests, and a meticulous reconstruction of the life history [of the offender] elicited from multiple sources—the patient himself; his family, friends, neighbors, teachers, and employers; and court, correctional, and mental hospital records. . ." 18 Crime & Delinquency at 383. Similarly, Cohen, et al, describe the norm for clinical predictions:

> In evaluating an offender, the clinician bases his or her prediction on an extended period of study, makes use of a variety of professional personnel, and consults diverse clinical, behavioral, and social sources of data. Typically, this involves a minimum of a sixty-day period.

18 Crime & Delinquency at 30-31.

Finally, these studies are apparently open ended in their definition of recidivism. As was noted *ante*, there is a wide discrepancy between the violence that may be indicated in general and that may be indicated for the relevant period of pretrial detention. There is no basis for supposing that a family court judge could predict reliably the juveniles who could be dangerous within the pretrial period.

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32. STATISTICAL PREDICTION

In reporting on both the current developments in statistical prediction and their own study, Wenk, Robison and Smith stated "The present state of the art holds little promise for the development of a prediction instrument that would warrant implementation in actual preventive or correctional programs." *Can Violence Be Predicted?*, 18 Crime & Delinquency 393, 401 (1972). While an expectation of increasing statistical sophistication might lead one to suppose that, in the fullness of time, a reliable predictive method could be achieved, there is no basis on which to suppose that the family court judge's evaluations could be expected to succeed where other attempts have failed.

For a number of reasons, the study reported in *Preventive Detention: An Empirical Analysis*, 6 Harv. Civ. Rights Civ. Lib. Rev. 289 (1971) ("Harvard study") is particularly telling. This study examined the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (July 29, 1970) ("preventive detention legislation"), which provides for the "preventive pretrial detention of arrested persons felt to pose a threat to the safety of the community." More specifically, under this law

> any defendant charged with a "dangerous" crime, with obstructing justice, or with a "violent" crime if certain conditions are met, may be held for pretrial detention hearing, at which a judicial officer is to determine whether any form of release can satisfactorily protect the community.

Id. at 303-04 (footnotes omitted). If the officer does not so conclude, he may order the defendant held for up to sixty days. In deciding which criminal defendants pose so great a danger to the community that they should be detained without bail, the statute charges the judicial officer to

> take into account such matters as [1] the nature and circumstances of the offense charged, [2] the weight of the evidence against such person, [3] his family ties, [4] employment, [5] financial resources, [6] character and mental conditions, [7] past conduct, [8] length of residence in the community, [9] record of convictions, and [10] any record of appearances at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.

Id. at 309. The statute does not assign a relative importance to these various factors.

The Harvard study tested the reliability of two numerical dangerousness scales, each of which combines in one index the particular de-

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fendant's score on all of the variables. The first scale (DS-1) was fashioned by assigning weights to the variables on the basis of a subjective assessment of their importance. The second scale (DS-2) "was constructed using a statistical technique, readjusting the weights of the variables on the basis of their actual correlations to recidivism in the sample." *Id.* at 310.

Each scale could be used by selecting a cut-off score, above which the individual would be detained. For DS-2, no cut-off point existed for which more recidivists than non-recidivists would be detained. Thus, over-prediction is a substantial problem. The lowest false positive to true positive ratio would be 1.5 to 1.0. To detain all true positives, 225 non-recidivists would be included along with the 41 recidivists. A point at which 63% of the recidivists would be retained would still represent a false positive to true positive ratio of 1.5 to 1. Much more startling are the results of the unsophisticated DS-1 scale. At its best, this scale would select correctly only about 30% of the time—that is, 7 false positives for every 3 true positives detained. To ensure that all recidivists were detained, in effect 8 nonrecidivists would have to be detained for every recidivist. Only by detaining fewer recidivists can this high degree of overprediction be avoided: When 40% of the recidivists were detained, the ratio was considerably reduced but was still high, a ratio of 2.88 to 1.

Neither of these sets of results actually measure what would happen in pretrial detention. First, the accurate and detailed information used in the study is not normally available to the judicial officer in a § 739 proceeding. Second, the Harvard study's definition of recidivism is not limited in time but relates to arrests and convictions occurring perhaps months following initial arrest and release. An accurate measure of the effectiveness of pretrial detention must consider the number of persons who would have committed crimes during the detention period only, and under this measure, the 60% accuracy figure for DS-2 falls to about 15%, and the 30% figure for DS-1 falls to about 5%.

In addition to the substantial body of literature in agreement that no reliable statistical prediction has been devised, the Harvard study indicates why the family court judge's determinations would be unreliable. Even to the extent that a set of variables could be attributed to the judge's evaluation, they would not have been weighted in a manner to enhance statistical reliability, and thus, the expectable range of accuracy would be that of the DS-1 scale. Further, since the judge's assessments bear only on pretrial detention, the expectable range of accuracy would likely be very low. Finally, the difficulty with overprediction would be substantial.

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> A clinical prediction entails a clinician reviewing whatever information is deemed relevant and making a predictive judgment on the basis of professional training and intuition. Clinical prediction requires an integration of available information about the individual in order to develop "some psychological hypothesis regarding the structure and dynamics of this particular individual."

Feld, *supra* at 543 (quoting P. Meehl, Clinical Versus Statistical Prediction 4 (1954)). Clinical methods rely on the use of trained psychiatric or social science staff. attempting a "wide band procedure in which a broad range of information about the individual is gathered from sources such as interviews, social history and projective testing." Koerin, Violent Crimes, Prediction and Control, 24 Crime & Delinquency 49, 51 (1978). Fashioning the hypothesis about the particular individual is frequently said to be done in terms of diagnostic frame of reference—a scheme of important personal variables that figure in the individual's personality and some sense of the dynamics of the personality. *See e.g.* Kozol, Boucher and Garofalo, The Diagnosis and Treatment of Dangerousness, 18 Crime & Delinquency 371, 384-86 (1972).

Actuarial or statistical prediction, on the other hand

> entails the development of probability relationships between predictor variables, such as age and prior offenses, and the behavior to be predicted—violence. It requires an examination of the individual only to determine the presence of the predictor variables.

Feld, *supra* at 543. In statistical prediction, the individual is, in effect, classified in terms of the presence or absence of

the predictor variables. Given the classification, the frequencies of behaviors can be concluded for persons belonging to the same class. *Id.*

The family court judge's evaluation of a juvenile bears a superficial resemblance to both methods in the sense that it lacks the refinements of each. The judge's assessment could not properly be called a clinical prediction, unless it could be supposed that the judge's experience on the bench and his judgment of human nature substitutes for a clinician's training; his confrontation with the accused juvenile substitutes for a diagnostic interview and examination; and the juvenile's arrest record substitutes for a patient's history. Nor is the evaluation by the judge in any way comparable to a rigorous statistical prediction. In comparison to the large number of variables used in the studies of statistical prediction, apparently very little data is made available to the judge. And, what is presented is crude and unrefined. There is no guarantee that significant information is available to him, or, if it is there, that it is perspicuous. Finally, there is no use of follow up studies to refine and reformulate the statistical prediction method that, implicitly, the family court judge might be said to be using. Accordingly, he would continue to rely on useless or even incorrect data and assign incorrect weight to the various variables utilized.

The literature generally agrees that no reliable method of predicting dangerousness, whether clinical or actuarial in nature, exists at this time. It follows *a fortiori* that the family court judge's opinion, lacking the refinements of each sort of predictive method, is also unreliable. Further, even to the extent that the literature on each type of method

is sometimes optimistic about the prospect of developing a reliable clinical or statistical method, nothing can properly be inferred about the judge's evaluation of juveniles, since the indications of optimism reflect methodological improvements which are not utilized in the judge's determinations.

Thus, it is clear that juveniles who are subjected to § 739 detention have their freedom curtailed by judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates.

In *Jurek v. Texas*, 428 U.S. 262, 275-6 (1976), an attack on a Texas statute, requiring a jury at the sentencing proceedings following conviction for a capital offense to consider whether the evidence established beyond a reasonable doubt that the defendant would commit criminal acts of violence, that would constitute a continuing threat to society, was rejected in an opinion by Justices Stewart, Powell and Stevens. They said:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. . . . The task that a Texas jury must perform in answering the statutory question at issue is thus basically no different from the task performed countless times every day throughout the American system of criminal

> justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

(footnote citations omitted)

The attorney general argues to the same effect, but the views expressed by the Justices in *Jurek* and the argument of the attorney general that courts are constantly engaged in predicting future conduct afford no basis for validating a § 739 determination.

Denial of bail because of a risk of non-appearance is usually made after a hearing which reveals that the defendant is in good health, has no roots in the community, no family ties, is not employed and owns no property, has possible access to financial resources and no recognized attachments which would assure his appearance at trial. A sentence is imposed after full investigation of the defendant's background. The Texas jury in *Jurek*, as in bail and sentencing cases, had all possible relevant information about the defendant, and it had heard evidence adduced at trial and found him guilty beyond a reasonable doubt of an offense for which the defendant could be sentenced to death.

The family court judge in making a § 739 decision knows nothing about the juvenile if he is a first time offender. The judge, of course, has the charges before him, but he also should know that the charges will surely be reduced at probable cause or fact finding. If the juvenile has had prior court contact, the judge knows that he has before him a recidivist, but at that point he does not know the extent of the juvenile's personal involvement, the extent to

which the charges have been inflated and whether probable cause will be found. He must operate on intuition and his personal predilections, the antithesis of reasoned action.

Arbitrary and capricious adjudications that may deprive a juvenile of his freedom because of a feeling that a probation officer and judge have that the juvenile will commit a crime if released—a feeling that is intuitive rather than reasoned—are fundamentally offensive to a concept of ordered liberty in a free society.

Moreover, even aside from the innate inability to support a § 739 order of pretrial detention as a rational or reasoned judgment, the record is replete with § 739 determinations that constitutes arbitrary and capricious action in its crudest and rawest form. Whether the juvenile was a first offender with no prior conduct, whether the court was advised that the juvenile was an obedient son or was needed at home, whether probation intake recommended parole, the case histories in this record disclose that it was not unusual for the court to discount these considerations and order remand based on a 5 to 15 minute evaluation. *See e.g.*, transcript of proceedings in case file histories of Carlos Fargas, Johnny McArthur, Christopher Cox, Glen Maloney, Wade Forde, Francisco Ramos, Jerome Basnight, Jose Cruz.

What seems to be the most patently arbitrary action, however, occurs in those cases in which the juvenile is paroled to the custody of his parents or guardians after the incident, has been home on parole ranging in the case histories in this record from roughly 5 days to over a month prior to the § 739 hearing, and even though there is no

showing of any other infraction while on parole, the judge nonetheless orders remand purportedly because there is a risk that the juvenile will commit a new crime before he is tried on the instant offense. Whatever meager rationale may exist in other situations to warrant ordering the juvenile confined pursuant to a § 739 determination, remand is wholly unjustified and unsupportable in these circumstances, and if the determination could be tested on review, it would surely be set aside as a clear abuse of discretion.

The examples in this record are such as to indicate that a § 739 remand is not unusual even in such cases. For example Carlos Fargas was arrested on April 24, 1979, and paroled to the custody of his parents. His § 739 hearing occurred on June 6, some 43 days later. His mother was sick in the hospital. Nonetheless, he was ordered remanded. Similarly, Luis and Sammy Rosario were charged with involvement in a delinquent act which occurred on March 2, 1978. Both were on parole from March 2 to March 15 when their § 739 hearing took place. Both were remanded. Johnny McArthur was involved in delinquency on October 12, 1977. He was on parole from that date until his § 739 hearing on November 28, 1977. His mother spoke highly of Johnny, but he was remanded. Christopher Cox, Glen Maloney and Wade Forde, along with Clarence Smith and Alex Michael, were involved in an incident on October 13, 1976, and paroled to the custody of their parents. At the § 739 hearing on November 12, in response to a court inquiry, the police officer stated that the boys had not given him any trouble. Smith, who had private counsel, and

Michael were paroled. Cox, Maloney and Forde, however, were remanded. There is nothing in the record to indicate the reason for the difference in treatment. Cox who was 13 was remanded and Michael, who was 15, was paroled. Probation intake had recommended parole for all. None had had any prior record.

Francisco Ramos was charged with a delinquency on March 4, 1978, and was on parole from March 4 to his § 739 hearing on March 17. While this was his 9th arrest and he was on parole on other matters, he had been reporting regularly. Parole was recommended. He was remanded. Jerome Basnight was free on parole for 6 days after his delinquent act, from October 14, 1977, until October 20, 1977. At his § 739 hearing on the latter date, despite this being his first court contact, he was remanded. Jerome Cruz was on parole from March 7, 1977, until his § 739 hearing on March 25, 1977. This was his first court contact, but he was remanded.

Carl Harris and Michael Taylor were free on parole from March 5, 1977, to March 17, 1977; Tyrone Parson was free on parole from November 6, 1976, to December 1, 1976; Daniel Nelson was free on parole from April 19, 1977, to May 3, 1977; and Daniel Gregoire was free on parole from August 23, 1977, to September 20, 1977. Each was remanded. It is conceded that these juveniles had prior court contacts. In the case of Parsons, there had been 7 such contacts, and in the case of Gregoire, 6 such prior contacts, five of which had been dismissed. While evidence of prior delinquency may make remand seem less egregious than the other listed examples, arbitrary use of § 739 power is nonetheless clearly manifest when a juvenile comes to court

days, weeks or more than one month after the charged incident without any showing of any intervening criminal act and is nonetheless remanded because of the court's professed belief that he will commit a crime before the return date. Such determination under those circumstances is both irrational and unreasoned. A statutory scheme that permits an individual's freedom to be restricted pursuant to that kind of irrational behavior must be condemned under the due process clause. *See Kent v. United States, supra; Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

2. A juvenile subjected to pretrial detention has not as yet had a "judicial determination of probable cause which the Fourth Amendment requires as a prequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Bell v. Wolfish*, 441 U.S. 520, 526 (1979). When a juvenile is arrested and held in custody he must be taken before a family court judge within 24 hours for a § 739 hearing. The judges may postpone the hearing for another 24 hours. No probable cause determination is made before the § 739 hearing. The juvenile at this stage is without counsel until he appears for the § 739 hearing. In some instances he is before the court on a delinquency petition filed on information and belief. That is, the charges in the petition are not verified by someone with direct knowledge of what took place. If ordered remanded, a fact finding hearing must occur 3-6 days thereafter. That hearing may be delayed for as long as 14 days after the § 739 hearing but in such a case a probable cause hearing must be held within 72 hours of the § 739 hearing. Accordingly a juvenile may be held in pretrial detention under a § 739 determination for as long as 5 days prior to

any proceedings being held, neutral or adversary, pursuant to which a judicial determination of probable cause is made.

The burdens of pretrial detention are substantial to impose on a presumptively innocent man, even when there is probable cause to believe he has committed a crime. *Baker v. McCollan*, 443 U.S. 137, 153, (1979) (Stevens, J., dissenting). To allow a state to impose these burdens on a juvenile before the state has taken the initial validating step of establishing its right to restrict the individual's liberty, in order to insure his presence at trial, would seem to be at war with accepted concepts of due process of law.

While not every disability inflicted during pretrial restraint amounts to punishment in the constitutional sense, *Bell v. Wolfish, supra*, 441 U.S. at 537, and there is clearly a distinction between punitive measures, imposition of which the constitution forbids prior to an adjudication of guilt and regulatory restraints that may be permissible, *id.; Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-167, 186 (1963), the Act at issue here licenses a judge of the family court, acting on an intuitive hunch that the juvenile is probably guilty, to treat an adolescent like a convict until his innocence is established. In a society riddled with violence and fearful of crime, this approach may seem appropriate. Whatever current social imperatives might lead us to wish to deal with the problem of juvenile delinquency on the above basis, the presumption of innocence is ingrained in the fabric of our fundamental law, and the prerogatives § 739 permit contravene guaranties and rights we have long considered fundamental. *See e.g., Ingraham v. Wright.* Pretrial adult detainees held because they could not meet the terms of bail have the presumption of inno-

cence even though there has been a probable cause determination. Such detention has been held to be regulatory, not punitive, *see Bell v. Wolfish*, but juveniles held in pretrial detention present a stronger case of innocence than the adult. There has been no probable cause determination as to them, and "under the Due Process Clause a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish, supra* at 535.

3. When a court pronounces the judgment that a youth must be incarcerated under § 739 because he or she is likely to commit additional crimes if released, the act of incarceration constitutes punishment which cannot constitutionally be imposed prior to an adjudication of guilt. Such a decision to incarcerate offends the due process clause of the 14th Amendment because it is imbued with what have long been recognized as the three essential attributes of punishment: it inflicts a deprivation of a constitutionally protected liberty or property interest; it is officially imposed rather than being the spontaneous act of an errant official, *see Hernandez v. Lattimore*, 612 F.2d 61, (2d Cir. 1979); and it stigmatizes the youthful detainee in a way that associates him with criminal behavior.

Whether a deprivation of liberty or property constitutes "punishment" has often turned on the criminal or noncriminal nature of the behavior for which it is imposed. *Compare Trop v. Dulles*, 356 U.S. 86 (1958) (loss of citizenship for desertion from armed forces held to be punishment) *with Perez v. Brownell*, 356 U.S. 44 (1958) (loss of citizenship for voting in foreign election held not to be punilshment). *See also Lipke v. Lederer*, 259 U.S. 557

(1922); *United States v. LaFranca*, 282 U.S. 568 (1931). In the latter two cases the regulatory or penal character of a tax depended on its "involving the idea of punishment for infraction of the law." 282 U.S. at 572. Similarly, in *Kennedy v. Mendoza-Martinez*, *supra*, the automatic forfeiture of citizenship for draft evaders was held to constitute punishment.

However, "punishment" is not limited to deprivations based on having committed a specific, identifiable crime. It is sufficient if the person is stigmatized as disreputable in a manner closely analogous to the process that occurs upon a formal finding of criminal guilt. In *United States v. Lovett*, 328 U.S. 303 (1946), the termination of employment for government employees "found guilty of disloyalty" was characterized as punishment notwithstanding the absence of any specific law making disloyalty a crime. 328 U.S. at 316. A similar process of stigmatization occurs with juveniles who are incarcerated because of anticipated imminent criminal behavior notwithstanding the court's inability to predict or specify what crimes they will commit.

The sharp distinction between pretrial detention of juveniles § 739 and pretrial detention of adults for failure to meet bail is apparent when we consider the criteria traditionally used to distinguish punitive from regulatory impositions:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is

> already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned. . .

Kennedy v. Mendoza-Martinez, supra, 372 U.S. at 168-69; *also see Bell v. Wolfish, supra,* 441 U.S. at 537-538. Bail is set for adults for the specific purpose of assuring the defendant's appearance at trial, and as such it may not be "excessive." U.S. Const. 8th Amendment. Excessiveness is determined in relation to this specific purpose. A court may not impose higher bail than appears "reasonably necessary" to effectuate the justifying reason for the restraint. *Stack v. Boyle,* 342 U.S. 1 (1951).

In contrast to the rather specific delimited purpose for which bail is set, the purposes of § 739—to protect society from juveniles' criminal conduct—are not sufficiently distinguishable from those of the juvenile justice system as a whole to constitute an "alternative purpose." Moreover, even if they did constitute such, the inability of trial judges to predict which juveniles will commit crimes, *see* discussion *ante* pp. 66a-79a *et. seq.*, means that any given decision to detain cannot "rationally be connected" with the purpose behind it. Thirdly, the stigmatizing of juveniles as prospective or habitual criminals prior to trial is such a departure from basic principles of due process that it "appears excessive" even in relation to the goal of protecting society.

The state cannot escape the obviously punitive nature of detention under § 739 by labelling the statute "preventive" and "regulatory," since "even a clear legislative classification of a statute as 'non-penal' would not alter the

fundamental nature of a plainly penal statute." *Trop v. Dulles, supra,* 356 U.S. at 95. If incarceration under the statute were based exclusively on a founded suspicion that the juvenile had committed crimes, no one would doubt that this constituted punishment. To hold that it is not "punishment" when based on a vague suspicion that the juvenile may commit future crimes would render the applicability of the due process clause in inverse proportion to the arbitrariness of governmental decision-making. The absurdity of such a result is perhaps what inspired Chief Justice Warren to insist that a deprivation did not cease to be punitive because its professed goals were preventive:

> It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

United States v. Brown, 381 U.S. 437, 458 (1965). When detention is imposed solely on grounds which are tantamount to a stigma of criminality, this is "punishment" regardless of the label attached, and regardless of whether it is based on past or predicted future acts.

A statutory scheme which empowers the state to have juveniles incarcerated for as long as 5 days without the state having established a justification for their being held surely constitutes a punitive measure offensive to due process requirements.

Accordingly, I hold that placing a juvenile under disability of restraint pursuant to the arbitrary and subjective

evaluation of a judge before the state has been required to show that his being held, even for regulatory reasons, is punitive and in violation of due process.

For these reasons I find § 739(a)(ii), both on its face and as applied, contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

IT IS SO ORDERED.

Dated: New York, New York
April 17, 1981[†]

/s/ ROBERT L. CARTER

ROBERT L. CARTER
U.S.D.J.

[†] Filed April 20, 1981.—*Ed.*

APPENDIX D

April 3, 1978 District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA, ex rel. GREGORY MARTIN, et al.,

Petitioners,

against

ROBERT K. DAVIS, Director of Detention Services, Human Resources Administration,

Respondent.

[APPEARANCES OMITTED IN PRINTING.]

CARTER, D.J.

OPINION

In this habeas corpus proceeding petitioner, Gregory Martin, seeks to have the action certified as a class action, a declaratory judgment that Section 739(a)(ii) of the Family Court Act ("the Act") violates the due process and equal protection clauses of the 14th Amendment and an order mandating the release of all persons held pursuant to the aforementioned New York statute. Petitioner has

moved to allow this proceeding to go forward as a class action, and the state has filed a motion to dismiss the writ on the ground that petitioner has failed to exhaust state remedies and opposes the motion for class action certification as well.

The complaint in this case was filed on December 21, 1977, and because of the short term duration of pre-trial detention under the Act, the matter was brought on by order to show cause on January 3, 1978. In his papers and at the order to show cause hearing, petitioner addressed himself only to the class certification issue. In its answering memorandum filed on January 11, 1978, the state argues that the class certification motion should be denied and that the writ should be dismissed because petitioner has failed to exhaust state remedies. Petitioner has filed a reply memorandum contravening the state's arguments. Petitioner filed, on March 31, 1978, an amended petition adding two additional parties as petitioners in this action.

Section 739(a) of the Act provides:

> After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. . . . [t]he court shall not direct detention unless it finds [sic: phrase omitted] that unless the respondent is detained:
>
> . . . .
>
> (ii) there is a serious risk that he may before the return date do an action which if committed by an adult would constitute a crime.

The only issues to be decided at the present time is whether the jurisdictional requisites of 28 U.S.C. § 2254(b)

which require that federal habeas not issue unless the state prisoner has exhausted allowable state remedies have been met; and if the answer to that inquiry is yes, should the action be certified as a class action?

Petitioner Gregory Martin, a 14 year old, has been charged in the Family Court in Bronx County with committing acts which if committed by an adult would constitute crimes of robbery 1 in violation of § 160.15, New York Penal Law; assault 2, in violation of § 120.05, New York Penal Law, and possession of a weapon 2, in violation of § 265.03, New York Penal Law. A probable cause hearing was held on December 19, 1977, and Family Court Judge Joseph A. Duran found that probable cause had been established. Moreover, he also found a substantial probability that petitioner would commit another crime before his trial could be held if he were at liberty. Accordingly, pursuant to § 739(a)(ii) of the Act he ordered petitioner remanded. On December 27, 1977, a fact finding hearing took place and petitioner was found guilty of violating Sections 160.15 and 265.03, New York Penal Law. Sentencing was adjourned until January 13, and petitioner was again remanded.

Petitioner Luis Rosario, a 14 year old, is charged in the Family Court, Kings County, with acts that if committed by an adult would constitute the crimes of robbery 1 in violation of § 160.15, New York Penal Law and assault 2, in violation of § 120.05, New York Penal Law. Petitioner Kenneth Morgan, a 14 year old, is charged in Family Court, Queens County, with acts which would constitute crimes of attempted robbery in violation of § 160.10, New York Penal Law and attempted grand larceny in violation of § 155.30, New York Penal law if committed by an adult. Petitioners

have not been tried on these charges, and under the authority of § 739(a)(ii) of the Act, they have been remanded to the Juvenile Center, Bronx and the Juvenile Center, Queens respectively based upon a prediction by the court that if released, petitioners would commit another crime before their trial could be held.

Jurisdiction

Jurisdiction is invoked pursuant to Title 28, U.S.C. 2241(c) authorizing the issuance of writs of habeas corpus by this court when a prisoner is held in state custody in violation of the Constitution or laws of the United States.

Exhaustion of State Remedies

28 U.S.C. § 2254 limits the authority of the court to issue writs of habeas corpus to those state custody cases where the petitioner has either exhausted all available state remedies, or where there are no available state corrective processes or circumstances render such processes ineffective.[1] Since the threshhold consideration as to whether all available state remedies have been exhausted is a jurisdictional requisite, that issue should be addressed first.

Petitioners argue that the exhaustion of the state remedies requirement within the meaning of *Picard v. Connor,*

1. Section 2254(b) provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

404 U.S. 270 (1971) has been met because the Act was specifically held to be free of due process and equal protection infirmities in *People ex rel. Wayburn v. Schupf*, 39 N.Y. 2d 682, 385 N.Y.S.2d 518, 350 N.E. 2d 906 (1976). The state contends, however, that all available state remedies were not exhausted in *Wayburn* since no appeal was taken to the United States Supreme Court from the decision of the New York Court of Appeals and that in any event these petitioners cannot attribute to themselves the pursuit of state remedies taken by someone else (state's brief, pp. 1-8).

Wayburn was an individual action attacking the constitutionality of the Act. When the case reached the New York Court of Appeals, Wayburn was no longer being held in pretrial detention. He had already been tried and sentenced. The Court of Appeals refused to dismiss on grounds of mootness "(b)ecause the situation is likely to recur, . . . and the substantial issue may otherwise never be reached (in view of the predictably recurring happenstance that, however expeditiously an appeal may be prosecuted, fact finding and dispositional hearings normally will have been held and a disposition made before the appeal could reach us)." *Id* at 687. Accordingly, it reached the merits. *Wayburn* explicitly recognizes that pretrial detention as authorized in the Act impinges on fundamental rights. The court subjected the Act to the strict scrutiny test mandated by the United States Supreme Court in situations affecting fundamental rights, *see, e.g., Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (voting rights); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia State Board of Elections*, 383 U.S. 663

(1966) (voting rights), and found a compelling state interest warranting the pretrial detention of juveniles and justifying the differences between the treatment of youth and adults authorized by the Act. Accordingly, the Act was upheld as free of the claimed due process and equal protection deficiencies. No appeal was taken to the United States Supreme Court. Indeed, it is unlikely that an appeal could have withstood a claim of mootness. *See Sosna v. Iowa*, 419 U.S. 393, 403 (1975): "There must not only be a named plaintiff who has . . . a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case." (footnotes omitted).

The exhaustion doctrine is firmly grounded in considerations of federal-state comity. It is clear, however, that § 2254 was not designed to "erect insuperable or successive barriers to the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson*, 404 U.S. 249-251 (1971), *quoting Fay v. Noia*, 372 U.S. 391, 438 (1963). All that is necessitated "is that the state courts must have had a 'fair opportunity' to consider a constitutional claim before federal habeas is available under the exhaustion doctrine." *United States ex rel. Leeson v. Damon*, 496 F.2d 718, 721 (2d Cir.), *cert. denied* 419 U.S. 954 (1974). It is regarded as placing needless stress on federal-state relations and as hence unseemly for a federal

court to upset a state court conviction without the state courts being first afforded the opportunity to pass upon the contentions which allegedly warrant release on federal habeas corpus.

Wayburn is an authoritative and unanimous holding of New York's highest court. All the judges on that court agreed that the state had a sufficiently compelling state interest in the guardianship of its youth to justify the promulgation of a law which permits youth to be held in pretrial detention on a prediction that if released the youth might commit another crime before he could be brought to trial. There have been no intervening decisions by the New York Court of Appeals or the United States Supreme Court to warrant any expectation that *Wayburn* no longer reflects the law of New York. Since we already have an authoritative state determination on the federal claims raised here which reflects the current status of New York law, exhaustion of state remedies by these petitioners would seem to be an exercise in futility. *See Stubbs v. Smith*, 533 F.2d 64 (2d Cir. 1976); *Johnson v. Robinson*, 509 F.2d 395, 397 (D.C. Cir. 1974); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1130 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); *Mercado v. Rockefeller*, 502 F.2d 666 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *Sarzen v. Gaughan*, 489 F.2d 1076 (1st Cir. 1973); *Layton v. Carson*, 479 F.2d 1275 (5th Cir. 1973); *United States ex rel. Hughes v. McMann*, 405 F.2d 773 (2d Cir. 1968); *Evans v. Cunningham*, 335 F.2d 491 (4th Cir. 1964); *Gesicki v. Oswald*, 336 F. Supp. 371, 374 n.3 (S.D.N.Y. 1971) (Kaufman, C.J.), *aff'd without opinion*, 406 U.S. 913 (1972).

Appendix D

The state argues that the authority of the above cited cases is inapposite since in *Wayburn* the state appeal process was terminated prior to completion in that no appeal was sought in the United States Supreme Court. *Ex parte Hawk*, 321 U.S. 114 (1944) is relied on for the view that resort to the United States Supreme Court on direct appeal is necessary before exhaustion of the state process can be said to have been completed (State brief, pp. 4-9). This was certainly the law through *Darr v. Burford*, 339 U.S. 200 (1950). In *Fay v. Noia*, 372 U.S. 391 (1963), however, the Court rejected that position. In discussing the reach of federal habeas corpus first extended to state prisoners by the Judiciary Act of 1867, the Court stated that the extension of federal habeas corpus to state custody cases "seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions" (*Id.* at 416), and *Darr v. Burford*, insofar as it was thought to bar a state prisoner from federal habeas corpus relief if he has failed to seek certiorari in the United States Supreme Court, was overruled. *Id.* at 436.

While *Fay v. Noia* has been severely limited by *Wainwright v. Sykes*, —— U.S. —— 97 S. Ct. 2497 (1977), its holding that the exhaustion doctrine does not require seeking certiorari in the United States Supreme Court for direct review of the state court decision as a necessary prerequisite to federal habeas corpus was not affected. *Wainwright* dealt principally with state procedural defaults which were held to afford adequate state grounds for denial of federal habeas corpus relief unless "a showing of cause for the

noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation" (97 S.Ct. at 2505) is made. *Darr v. Burford* was not resurrected. Indeed, the writ has been consistently allowed without direct review by the Supreme Court on certiorari. *See Francisco v. Gathright*, 419 U.S. 59 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Peters v. Kiff*, 407 U.S. 493 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971).

The state concedes the validity of this argument insofar as certiorari is concerned but argues a different principle is applicable when review by the Supreme Court may be had on direct appeal. There is no logical basis for requiring an appeal as a requisite to a right to federal habeas corpus relief while there is no such necessity in respect of certiorari. The reason for not mandating that certiorari be sought first as part of the exhaustion requirement before federal habeas relief can be entertained is that this procedure was found to be neeedlessly time consuming and burdensome. Since federal-state comity can be satisfied without imposing this needlessly formalistic structure, the requirement was abandoned.

In discussing this issue, the Court in *Fay v. Noia* stated:

> "It is also true Ex parte Hawk . . . intimated in *dictum* that exhaustion might comprehend seeking certiorari here . . . But that passing reference cannot be exalted into an attribution to Congress [in respect of § 2254] of a design patently belied by the unequivocal statutory language.
>
> The rationale of Darr v. Burford emphasized the values of comity between the state and federal courts, and assumed that these values would be realized by

requiring a state criminal defendant to afford this Court an opportunity to pass upon state action before he might seek relief in federal habeas corpus. But the expectation has not been realized in experience. On the contrary the requirement of Darr v. Burford has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes.

. . . .

. . . The requirement that the habeas petitioner exhaust state court remedies available to him when he applies for federal habeas corpus relief gives state courts the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction. And the availability to the States of eventual review on certiorari of such decisions of lower federal courts as may grant relief is always open. Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded on the full and complete record which the lower federal courts on habeas corpus are in a position to provide." 372 U.S. at 436-38.

Federal-state accommodation is fully met when the petitioner has presented the federal claims and exhausted all available state remedies in the state courts in respect to them, giving the state the first opportunity to take corrective action. To require direct review by the Supreme Court puts form before substance. Since there is no rational basis to require direct appeal while not requiring certiorari, the court holds that *Wayburn* satisfies in all respects the exhaustion requirements which the petitioners must meet.

Appendix D

Class Action Determination

Class action certification is clearly permissible in federal habeas corpus proceedings. *Gerstein v. Pugh,* 420 U.S. 103 (1975). While full application of the federal rules of civil procedure is not appropriate, the court may "fashion expeditious methods of procedure in a specific case." *United States ex rel. Sero v. Preiser, supra,* 506 F.2d at 1125. As in *Sero,* there are unusual circumstances which warrant allowing this matter to proceed as a class action. The issue raised is a narrow one—may the state subject its youth to pretrial detention on the prediction of a probability that the youth is likely to commit another crime before he can be brought to trial? Only youths may be subject to such a deprivation of their freedom before being adjudged guilty of a criminal offense in some state court proceedings. There is, therefore, a question of law and fact common to the class, and the claims asserted here are typical of the claims of the class. Because of the relative short duration of the pretrial detention authorized by the Act, each member of the putative class if he proceeds on an individual basis, is faced with the prospect of having his claims become mooted before final adjudication in federal habeas corpus proceedings. Yet the class is large, although indeterminate.

The 22nd Annual Report of the Administrative Board of the Judicial Conference for the year 1977 at Tables 80 and 81, pages 162-165 provides statistics showing statewide that in 1976, 58 girls were held in custody before petitions were filed charging them with juvenile delinquency, and 278 girls were held between the filing of the petition and disposition for periods ranging from 1-7 days (111), 8-14

days (44), 15-21 days (23), 23-30 days (29), 31-90 (55), 91-180 days (12), 181-365 days (3), to more than a year (1). 459 boys were held in custody before petitions were filed charging them with juvenile delinquency, and 2,813 boys were held between the filing of the petition and disposition in periods ranging from 1-7 days (1166), 8-14 days (502), 15-21 days (271), 22-30 days (250), 31-90 days (476), 91-180 days (115), 181-365 days (30) to over a year (3). These statistics relate to pre trial detention based on a finding that the juvenile, if at liberty, is not likely to appear at trial, and a finding that he is likely to commit another crime, if at liberty, before he can be brought to trial. The report does not separate the two classes of pretrial detention.

The figures show that overall in 1976, some 517 youths, both girls and boys, were held in pretrial detention before any charge was levied, and that 3,091 youths, again both girls and boys, were held in pretrial detention between the filing of the petition and disposition which is the category to which petitioner's case belongs.

Attached to petitioners' brief in support of the motion for class action certification is a list of cases of pretrial detention of juveniles, based on a prediction that if at liberty the juvenile was likely to commit another crime before he could be brought to trial, handled by the Legal Aid Society of the City of New York, Juvenile Rights Division which handles 95% of all juveniles accused of being delinquent in the City of New York. Listed are some 18 such cases in 1977.

These specific cases occur, therefore, with some frequency. Joinder is obviously impracticable, and because of the special circumstances presented which render it unlikely that the claims raised here can be considered and decided in individual cases before the juvenile's pretrial detention has ended, 18 such cases meets the test of numerosity.

Petitioner in this action is being represented by lawyers for the American Civil Liberties Union, and the Legal Aid Society of New York. Such representation assures the interests of the class will be fairly and adequately represented and vigorously prosecuted. Therefore, there has been substantial compliance with the requirements of Rule 23, F.R. Civ.P. Accordingly, the matter may proceed as a class action, that is, on behalf of all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) of the Act.

IT IS SO ORDERED.

Dated: New York, New York
April 3, 1978[†]

/s/ ROBERT L. CARTER

ROBERT L. CARTER
U.S.D.J.

[†] Filed April 4, 1978.—*Ed.*

APPENDIX E

Notice of Appeal for Intervenor-Appellant

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 81-2175, 81-2193

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Petitioners-Appellees,

against

PAUL STRASBURG, as Commissioner of the New York City Department of Juvenile Justice,

Respondent-Appellant,

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant.

PLEASE TAKE NOTICE that the Intervenor-Appellant, ROBERT ABRAMS, as Attorney General of the State of New York, hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(2) from a judgment of the United States Court of Appeals for the Second Circuit, entered on September 20, 1982, which affirmed a

judgment of the United States District Court for the Southern District of New York declaring New York Family Court Act § 739(a)(ii) unconstitutional, and from each and every part thereof.

Dated: New York, New York
October 19, 1982[†]

[Addressees Omitted in Printing.]

Robert Abrams
Attorney General of the
State of New York
By:
/s/ Judith A. Gordon

Judith A. Gordon
Assistant Attorney General
Intervenor-Appellant, Pro Se
Two World Trade Center
New York, New York 10047
(212) 482-2462

[†] Filed on October 20, 1982.—*Ed.*

APPENDIX F

Notice of Appeal for Appellant

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 81-2175, 81-2193

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Petitioners-Appellees,

v.

PAUL STRASBURG, as Commissioner of the New York City Department of Juvenile Justice,

Respondent-Appellant,

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor.

Notice is hereby given that PAUL STRASBURG, the respondent above-named, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered in this action on September 20, 1982, which affirmed a judgment of the United States District Court for the Southern District of New York (Carter, J.), en-

tered on June 1, 1981, declaring New York Family Court Act, section 739(a)(ii), unconstitutional.

This appeal is taken pursuant to 28 U.S.C. section 1254(2).

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Respondent-Appellant[†]

[†] Filed on December 3, 1982.—*Ed.*

AUG 1 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1248, 82-1278

IN THE

Supreme Court of the United States

October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

VOLUME I

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Appeal Docketed January 24, 1983
Probable Jurisdiction Noted April 18, 1983

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Relevant Docket Entries in the United States District Court for the Southern District of New York

77 Civ. 6176 (RLC) Martin, Rosario, Morgan et al v Davis, Strasburg

DATE	NR.	PROCEEDINGS
12-21-77	1	[Filed] Petition for a writ of H/C and Declaratory Judgment.
12-30-77	2	[Filed] Petitioners' OSC for a writ of H/C . . . ret 1-3-78 5 PM . . . Rm 706 . . . Carter, J.
12-30-77	3	[Filed] Petitioners' Memo for a writ of H/C.
1-10-78	4	[Filed] Respondent's affdv't by J. L. Koch in opposition to Petitioners' application for certification of the class . . . Memo of law within.
1-11-78	5	[Filed] Respondent's Memo requesting denial of writ, . . . and in opposition to motion for [class action] order.
1-16-78	6	[Filed] Petitioner's Reply Memo in opposition to req[uest] for denial of writ for failure to exhaust State remedies and in support of motion for [class action] order.
3-31-78	7	[Filed] 1st Amended Petition for a writ of H/C and Declaratory Judgment—class action.
4- 4-78	8	[Filed] Opinion #47060. . . . Accordingly, the matter may proceed as a class action, that is on behalf of all juveniles who are now being held or will be held before these proceedings are concluded in pretrial detention under 739(a)(ii) of the Act. It is So Ordered. . . . Carter, J.

District Court Docket Entries

DATE	NR.	PROCEEDINGS
4-18-78	9	Filed transcript of record of proceedings, dated 3-24-78.
4-20-78	10	[Filed] Respondent's Answer to 1st Amended Petition.
4-25-78	11	[Filed] [Intervenor's] Interrog[atories] upon [Petitioners'] Attys.
		* * *
6-14-79	13	Filed Amended Pre-Trial Schedule Order. . . . Carter, J.
7-16-79	14	Filed Pre-Trial Order. . . . Carter, J.
3- 4-80		Non-jury trial begun & continued and adj. to 3-6-80.
3- 6-80		Trial cont'd and adj. to 3-24-80.
3-24-80		Trial cont'd.
[3-25-80		Trial cont'd.]
3-31-80		Trial concluded. Dec. Res.
3- 6-80	15	Filed Petitioners' Proposed Findings of Fact [and Conclusions of Law].
6- 3-80	16	Filed Petitioners' Post-Trial Memorandum.
6- 4-80	17	Filed Stip. & Order that the caption of this proceeding is amended to delete R.K. Davis and substitute instead Paul Strasburg, [etc]. . . . Carter, J.
6-13-80	18	Filed Petitioners' Post-Trial Memorandum [amended].
6-18-80	19	Filed Abrams Att'y Gen's Post-Trial Memorandum.

District Court Docket Entries

DATE	NR.	PROCEEDINGS
7- 3-80	20	Filed Petitioners' Reply Brief.
8-18-80	21	Filed transcript of record of proceedings, dated [3/6, 3/24 and] 3/31/80.
4-20-81	22	Filed Opinion #51492: . . . For these reasons I find §739(a)(ii), both on its face and as applied, contravenes the rights of Petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the U.S. . . . Carter, J.
4-30-81	23	Filed Judgment that the Petitioners have Judgment that the N.Y. Family Court [Act §739(a)(ii)] . . . is punitive and in violation of due process. . . . Clerk.
		• • •
6- 1-81	25 [23]†	Filed memo endorsed on front of Judgment dated 4-30-81 that the Judgment filed 4-30-81 is hereby vacated. . . . Carter, J.
6- 1-81	26 [24]†	Filed Judgment, ordered that the application for writ of *habeas corpus* for members of the Petitioner class in the custody of respondent is granted. . . . Carter, J. Judgment entered 6-1-81 . . . . Clerk.
6- 1-81	27 [25]†	Filed Affidavit of J. A. Levitt in support of [Respt's] Proposed Judgment and in support of [Respt's] application for a stay pending appeal.

† Numbers in brackets correspond to document numbers in the record on appeal to the Court of Appeals.—*Ed.*

District Court Docket Entries

DATE	NR.	PROCEEDINGS
6-10-81	28	Filed Intervenor's Amended Notice of Appeal from the Judgment . . . [entered] 6-1-81.
6-11-81	29	Filed Respondent's Notice of Appeal to the USCA from Judgment entered 6-1-81.
6-25-81	30 [26]†	[Filed] Stip. designating exhibits to USCA.
6-25-81	31 [26A]†	[Filed] Stip. . . . that the following documents [items 1-10] become part of the record on appeal.
6-26-81	32 [26B]†	Filed transcript of record proceedings, dated March 4, 1980.
6-25-81	33 [27]†	[Filed] Notice to the Clerk that the original record on appeal has been certified & transmitted to the USCA.
		• • •
10-13-81	35 [[28]]*	Filed Stipulation re: transmission of certain attached documents [items 1-4] to the USCA as part of the record on appeal.
10-13-81	36 [[29]]*	Filed Notice that supplemental record has been certified and transmitted to the USCA—Second Circuit.
		• • •
7-28-83	38 (30)**	Filed Stipulation that . . . transcript of proceedings dated March 25, 1980 became part of the record on appeal.

† Numbers in brackets correspond to document numbers in the record on appeal to the Court of Appeals.—*Ed.*

* Numbers in double brackets correspond to document numbers in the supplemental record on appeal to the Court of Appeals.

** Number in parentheses corresponds to document number in the second supplemental record on appeal to the Court of Appeals. The document number of the March 25 transcript is (31).

Relevant Docket Entries in the United States Court of Appeals for the Second Circuit

81-2175 Gregory Martin et al v. Strasburg & Martin

DATE	FILINGS—PROCEEDINGS

• • •

6-11-81 Filed copy of district court docket entries & amended notice of appeal on behalf of Intervenor-Appellant Robert Abrams, Esq.

6-15-81 Filed copy of district court docket entries & cross-[sic] notice of appeal on behalf of Respondent-Appellee Paul Strasburg [& in 81-2193]

• • •

7-2-81 Record on appeal filed [original papers of district court]. . . .

• • •

8-28-81 Intervenor-Appellant Abrams' motion for stay pending determination of appeal of class writ of habeas corpus filed.

8-28-81 Intervenor-Appellant Abrams' exhibits in support of motion for a stay filed.

8-28-81 Intervenor-Appellant Abrams' memorandum of law in support of motion for a stay received [filed 9/2/81 on motion for oversized memorandum of law].

• • •

9-18-81 Appellees' Martin . . . affidavit in opposition to Appellant's motion for a stay filed.

9-18-81 Appellees' Martin . . . memorandum of law in opposition to Appellant's motion for a stay filed.

• • •

Docket Entries in the Court of Appeals

DATE	FILINGS—PROCEEDINGS
9-22-81	Order . . . [denying] Intervenor-Appellant Abrams' motion for stay pending determination of appeal of class writ of habeas corpus filed [JON, ALK, CJJ, Daly, DJ] [endorsed on motion of 08-28-81].
	• • •
9-23-81	Issued certified copy of order denying motion for stay. . . .
10-15-81	Supplemental record on appeal filed [original papers of district court]
	• • •
10-26-81	Appellant Abrams' brief filed.
10-26-81	Appellant Abrams' Appendix filed [Volume I].
10-26-81	Appellant Abrams' Appendix filed [Volume II].
10-26-81	Appellant Abrams' Appendix filed [Volume III].
	• • •
10-26-81	Appellant Abrams' addendum filed.
	• • •
11-27-81	Appellees' Martin, et al brief filed.
12-14-81	Notice that cross- [sic] appellant Strasburg will rely on the brief of intervenor-appellant Abrams filed.
	• • •

Docket Entries in the Court of Appeals

DATE	FILINGS—PROCEEDINGS
1-12-82	Intervenor-appellant Abrams' Reply brief filed.
1-12-82	Case argued before: Oakes, Newman, Winter, CJJ (& in 81-2193).
1-21-82	Transcript of oral argument filed (distributed to panel 1-25-82).
9-20-82	Judgment affirmed by published, signed opinion filed (Winter, CJ).
9-20-82	Concurring . . . separate opinion filed (Newman, CJ).
9-20-82	Judgment filed.
10-20-82	Notice of Appeal to Supreme Court filed.
10-26-82	Issued mandate (Judgment & Opinion).
	• • •
12- 3-82	Respondent-Appellant Paul Strasburg Notice of Appeal to the Supreme Court filed.
	• • •

First Amended Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA ex rel. GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, et al.,
Petitioners,

v.

ROBERT K. DAVIS, Director of Detention Services, Human Resources Administration,
Respondent.

To: The Honorable United States District Court for the Southern District of New York:

INTRODUCTORY STATEMENT

1. This is a petition for a writ of habeas corpus and a declaratory judgment filed on behalf of the petitioners, GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and the class of persons they seek to represent, challenging the constitutionality of New York Family Court Act §739(a)(ii) (McKinney's 1976). Petitioners and the class of persons they represent are accused juvenile delinquents who are subject to being detained before trial based on a prediction that, if released, they would commit a crime.

JURISDICTION

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. §§2241 et seq. and 2254. The issuance of declaratory relief is authorized by Title 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure.

PARTIES

3. (a) Petitioner, GREGORY MARTIN, is a fourteen-year-old boy who was charged in the Family Court, Bronx County, with committing acts which if committed by an adult would constitute the crimes of Robbery 1 in violation of New York Penal Law §160.15; Assault 2 in violation of New York Penal Law §120.25; and Possession of a Weapon 2 in violation of New York Penal Law §265.03. Prior to his trial on these charges petitioner was unlawfully detained and restrained of his liberty at Juvenile Center, Bronx, New York. He was held in pre-trial detention based on a prediction that if he were released he would commit a crime before his trial were held. This is popularly known as preventive detention.

3. (b) Petitioner, LUIS ROSARIO, is a fourteen-year-old boy who is charged in the Family Court, Kings County, with committing acts which, if committed by an adult, would constitute the crimes of Robbery 1 in violation of New York Penal Law §160.15 and Assault 2 in violation of New York Penal Law §120.05. Petitioner ROSARIO has not been tried on these charges. He is presently unlawfully detained and restrained of his liberty at Juvenile Center, Bronx, New York. He is being held based on a prediction that if he were

released he would commit a crime before his trial were held. This is popularly known as preventive detention.

3. (c) Petitioner, KENNETH MORGAN, is a fourteen-year-old boy who is charged in the Family Court, Queens County, with committing acts which, if committed by an adult, would constitute the crimes of Attempted Robbery in violation of New York Penal Law §160.10 and Attempted Grand Larceny in violation of New York Penal Law §155.30. Petitioner MORGAN has not been tried on these charges. He is presently unlawfully restrained of his liberty at Juvenile Center, Bronx, New York. He is being held based on a prediction that if he were released he would commit a crime before his trial were held. This is popularly known as preventive detention.

4. (a) Petitioners bring this action on behalf of themselves and all others similarly situated as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class consists of those persons who are or, during the pendency of this action, will be preventively detained pursuant to New York Family Court Act §739(a)(ii) while awaiting trial on charges that they are juvenile delinquents.

4. (b) This class action is properly maintainable because: (i) the above class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class, namely, whether New York Family Court Act §739(a)(ii) is constitutional insofar as it authorizes deprivation of liberty based on a prediction that if released a person would commit a crime; (iii) the questions of law and fact common to the class predominate over

any questions affecting only individual members and a class action is superior to other available methods for a fair and efficient adjudication of the controversy; (iv) the claim of the representative petitioners are typical of the claims of the members of the class and it can be reasonably expected that respondent will interpose identical defenses to such claims; (v) the attorneys for petitioners will fairly and adequately protect the interests of the class; (vi) the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the respondent; and (vii) the respondent has acted or refused to act on grounds generally applicable to the class, thereby making the relief requested herein appropriate with respect to the class as a whole. In addition, this action is properly maintainable as a class action because without class action certification the action would become moot thereby prohibiting a ruling on the merits as to the whole class due to the transient nature of the class.

5. Respondent, ROBERT K. DAVIS, is the Director of Detention Services, Human Resources Administration, and in charge of Juvenile Center and has the unlawful custody of the petitioners.

FACTS

6. (a) The relevant facts of the MARTIN case are as follows: On December 13, 1977, petitioner was arrested and charged with being a juvenile delinquent. On December 14, 1977, a petition was filed in the Family Court, Bronx

County, formally charging petitioner. On that date petitioner appeared before the Family Court (Ferrara, J.) and was arraigned on the charges. Following the arraignment, petitioner was ordered to be held for trial without bail, pursuant to New York Family Court Act §739(a)(ii) (McKinney's 1976). Specifically, the court found, pursuant to that statute, that unless the petitioner were detained: "there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime." Petitioner was ordered held without bail until December 19, 1977.

6. (b) On December 19, 1977, a preliminary hearing was held in the Family Court (Doran, J.) to determine if there were probable cause to believe the petitioner MARTIN committed the crimes of which he was accused. The court found probable cause and ordered the petitioner to be confined in custody until at least December 27, 1977, the scheduled date of his trial.

6. (c) Petitioner MARTIN was convicted of Robbery I after a trial without a jury held on December 27 and 29 (Doran, J.). Upon his conviction petitioner was continued in custody without bail until January 13, 1978. At that time he was paroled into the custody of his mother. On February 6, 1978, petitioner was sentenced to 2 years probation. He is presently on probation.

7. (a) The relevant facts of the ROSARIO case are as follows: On March 3, 1978, petitioner was arrested and charged with being a juvenile delinquent. After being brought to the police precinct he was released to the cus-

tody of his mother on recognizance and instructed to appear in court on March 15, 1978. On March 15 a petition was filed in the Family Court, Kings County, formally charging petitioner. On that date petitioner voluntarily appeared before the Family Court (Roache, J.) and was arraigned on the charges. Following the arraignment, petitioner was ordered to be held until March 20, 1978, without bail, pursuant to New York Family Court Act §739 (a)(ii)(McKinney's 1976).

7. (b) On March 20, 1978, petitioner ROSARIO was ordered to be held until March 21, 1978, by the Family Court (Gibbell, J.). On March 21, a preliminary hearing was held in the Family Court (Gibbell, J.) to determine if there were probable cause to believe petitioner committed the crimes of which he was accused. The court found probable cause and ordered petitioner to be continued in custody for trial until March 29, 1978. On March 29, the trial did not take place and petitioner was continued to be held in custody until at least April 11, 1978, the next scheduled date of his trial.

8. (a) The relevant facts of the MORGAN case are as follows: On March 25, 1978, petitioner was arrested and charged with being a juvenile delinquent. On March 27, a petition was filed in the Family Court, Queens County, formally charging petitioner. On that date petitioner appeared before the Family Court (Moskoff, J.) and was arraigned on the charges. Following the arraignment, petitioner was ordered to be held for trial, without bail, until March 30, 1978, pursuant to New York Family Court Act §739(a)(ii)(McKinney's 1976).

8. (b) On March 30, petitioner MORGAN appeared before the Family Court (Levine, J.). On that date his trial did not take place and petitioner was again held in custody until at least April 4, 1978.

CAUSES OF ACTION

9. Petitioners are restrained and imprisoned in violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

10. Petitioners are restrained and imprisoned in violation of the equal protection of the law clause in the Fourteenth Amendment to the Constitution of the United States.

11. As a matter of law, New York Family Court Act §739(a)(ii) violates due process of law as guaranteed by the Fourteenth Amendment.

12. As a matter of law, New York Family Court Act §739(a)(ii) violates the Equal Protection of the Law clause in the Fourteenth Amendment.

EXHAUSTION OF STATE REMEDIES

13. Petitioners have exhausted all of their remedies in state court in that it is futile for petitioners to raise a constitutional challenge to New York Family Court Act §739 (a)(ii) in the New York courts. In 1976, the New York Court of Appeals, the state's highest tribunal, upheld §739 (a)(ii) over a challenge to its constitutionality on due process and equal protection grounds. *People ex rel. Wayburn* v. *Schupf*, 39 NY 2d 682 (1976).

14. No other application for this writ or the relief requested herein has heretofore been made to this or any other federal court.

WHEREFORE, petitioners pray that this Court:

a) Certify this action as a class action brought on behalf of all juveniles who are or, during the pendency of this litigation, will be preventively detained pursuant to New York Family Court Act §739(a)(ii) while awaiting trial on charges that they are juvenile delinquents;

b) Declare New York Family Court Act §739(a)(ii) unconstitutional on its face as violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;

c) Order the release of all persons detained pursuant to Family Court Act §739(a)(ii) while awaiting trial on charges that they are juvenile delinquents;

d) Grant such other and further relief as to this Court may seem just and proper.

Dated: March 31, 1978

[Subscriptions and verifications omitted in printing.]

Answer to First Amended Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

[TITLE OMITTED IN PRINTING.]

Robert K. Davis, Director of Detention Services, Human Resources Administration of the City of New York, hereby certifies and makes return and answer to the First Amended Petition as follows:

In Answer To The Allegations Of The Petition

1. Denies each and every allegation of paragraphs "3a", "3b" and "3c", that claims or may be construed to claim that petitioners, Gregory Martin, Luis Rosario and Kenneth Morgan, or any other detained juveniles, were and are unlawfully detained and restrained of their liberty at Juvenile Center, Bronx, New York.

2. Denies each and every allegation in paragraph "5" which alleges that Respondent, Robert K. Davis, has the unlawful custody of the petitioners or other juveniles.

3. Denies each and every allegation in paragraphs "9", "10", "11" and "12".

Respondent Certifies Pursuant To 28 U.S.C. 2243, That The True Cause of Petitioners' Detention Is As Follows:

4. That he is Director of Institutions and Facilities, Special Services for Children, for the City of New York and held or is holding the petitioners, Gregory Martin, Luis Rosario and Kenneth Morgan by authority of orders of remand of the Family Court of the State of New York. (Copy of the form of said remand orders is annexed hereto).

Wherefore, respondent Robert K. Davis prays the Court:

(a) To dismiss the petition of Gregory Martin, Luis Rosario, Kenneth Morgan and others in their class.

(b) Declare New York Family Court Act, Section 739 (a)(ii) constitutional.

Dated: New York, New York
April 17, 1978

[Subscription, verification and addressees omitted in printing.]

Exhibit to Answer

FAMILY COURT OF THE STATE OF NEW YORK

CITY OF NEW YORK

COUNTY OF .....

Docket No. .....

In the Matter of

.....

A Person Alleged to be a Juvenile Delinquent

ORDER DIRECTING DETENTION OF CHILD

....., a child under the age of sixteen, having been taken into custody (by a peace officer pursuant to Sections 721 and 724 of the Family Court Act) (by a private person pursuant to Sections 722 and 723 of the Family Court Act) (pursuant to a Warrant issued by this Court under Section 738 of the Family Court Act); and

(A) (NO) Petition under Article 7 of the Family Court Act having been filed in this Court with respect to said child; and said child having been brought before this Court and a preliminary hearing having been held; and

Exhibit to Answer

It appearing that:

The events occasioning the taking into custody involve a petition to determine whether said child is a juvenile delinquent; and that (there is a substantial probability that said child will not appear in Court on the return date) (there is a serious risk that said child may, before the return date, do an act which if committed by an adult would constitute a crime); it is therefore

ORDERED, that said child be and (he) (she) hereby is remanded to ..... to be detained pending further proceedings herein and further order of this Court.

Dated:

J.F.C.

April 3, 1978 District Court Opinion and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA, ex rel. GREGORY MARTIN, et al.,
Petitioners,

against

ROBERT K. DAVIS, Director of Detention Services,
Human Resources Administration,
Respondent.

[APPEARANCES OMITTED IN PRINTING.]

CARTER, D.J.

OPINION

In this habeas corpus proceeding petitioner, Gregory Martin, seeks to have the action certified as a class action, a declaratory judgment that Section 739(a)(ii) of the Family Court Act ("the Act") violates the due process and equal protection clauses of the 14th Amendment and an order mandating the release of all persons held pursuant to the aforementioned New York statute. Petitioner has moved to allow this proceeding to go forward as a class action, and the state has filed a motion to dismiss the writ

on the ground that petitioner has failed to exhaust state remedies and opposes the motion for class action certification as well.

The complaint in this case was filed on December 21, 1977, and because of the short term duration of pre-trial detention under the Act, the matter was brought on by order to show cause on January 3, 1978. In his papers and at the order to show cause hearing, petitioner addressed himself only to the class certification issue. In its answering memorandum filed on January 11, 1978, the state argues that the class certification motion should be denied and that the writ should be dismissed because petitioner has failed to exhaust state remedies. Petitioner has filed a reply memorandum contravening the state's arguments. Petitioner filed, on March 31, 1978, an amended petition adding two additional parties as petitioners in this action.

Section 739(a) of the Act provides:

> After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. . . . [t]he court shall not direct detention unless it finds [sic: phrase omitted] that unless the respondent is detained:
>
> . . . .
>
> (ii) there is a serious risk that he may before the return date do an action which if committed by an adult would constitute a crime.

The only issues to be decided at the present time is [sic] whether the jurisdictional requisites of 28 U.S.C. § 2254(b)

which require that federal habeas not issue unless the state prisoner has exhausted allowable state remedies have been met; and if the answer to that inquiry is yes, should the action be certified as a class action?

Petitioner Gregory Martin, a 14 year old, has been charged in the Family Court in Bronx County with committing acts which if committed by an adult would constitute crimes of robbery 1 in violation of § 160.15, New York Penal Law; assault 2, in violation of § 120.05, New York Penal Law, and possession of a weapon 2, in violation of § 265.03, New York Penal Law. A probable cause hearing was held on December 19, 1977, and Family Court Judge Joseph A. Duran found that probable cause had been established. Moreover, he also found a substantial probability that petitioner would commit another crime before his trial could be held if he were at liberty. Accordingly, pursuant to § 739(a)(ii) of the Act he ordered petitioner remanded. On December 27, 1977, a fact finding hearing took place and petitioner was found guilty of violating Sections 160.15 and 265.03, New York Penal Law. Sentencing was adjourned until January 13, and petitioner was again remanded.

Petitioner Luis Rosario, a 14 year old, is charged in the Family Court, Kings County, with acts that if committed by an adult would constitute the crimes of robbery 1 in violation of § 160.15, New York Penal Law and assault 2, in violation of § 120.05, New York Penal Law. Petitioner Kenneth Morgan, a 14 year old, is charged in Family Court, Queens County, with acts which would constitute crimes of attempted robbery in violation of § 160.10, New York Penal Law and attempted grand larceny in violation of § 155.30,

New York Penal law if committed by an adult. Petitioners have not been tried on these charges, and under the authority of § 739(a)(ii) of the Act, they have been remanded to the Juvenile Center, Bronx and the Juvenile Center, Queens respectively based upon a prediction by the court that if released, petitioners would commit another crime before their trial could be held.

Jurisdiction

Jurisdiction is invoked pursuant to Title 28, U.S.C. 2241(c) authorizing the issuance of writs of habeas corpus by this court when a prisoner is held in state custody in violation of the Constitution or laws of the United States.

Exhaustion of State Remedies

28 U.S.C. § 2254 limits the authority of the court to issue writs of habeas corpus to those state custody cases where the petitioner has either exhausted all available state remedies, or where there are no available state corrective processes or circumstances render such processes ineffective.[1] Since the threshold consideration as to whether all available state remedies have been exhausted is a jurisdictional requisite, that issue should be addressed first.

Petitioners argue that the exhaustion of the state remedies requirement within the meaning of *Picard v. Connor,*

1. Section 2254(b) provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

404 U.S. 270 (1971) has been met because the Act was specifically held to be free of due process and equal protection infirmities in *People ex rel. Wayburn v. Schupf*, 39 N.Y. 2d 682, 385 N.Y.S.2d 518, 350 N.E. 2d 906 (1976). The state contends, however, that all available state remedies were not exhausted in *Wayburn* since no appeal was taken to the United States Supreme Court from the decision of the New York Court of Appeals and that in any event these petitioners cannot attribute to themselves the pursuit of state remedies taken by someone else (state's brief, pp. 1-8).

Wayburn was an individual action attacking the constitutionality of the Act. When the case reached the New York Court of Appeals, Wayburn was no longer being held in pretrial detention. He had already been tried and sentenced. The Court of Appeals refused to dismiss on grounds of mootness "(b)ecause the situation is likely to recur, . . . and the substantial issue may otherwise never be reached (in view of the predictably recurring happenstance that, however expeditiously an appeal may be prosecuted, fact finding and dispositional hearings normally will have been held and a disposition made before the appeal could reach us)." *Id.* at 687. Accordingly, it reached the merits. *Wayburn* explicitly recognizes that pretrial detention as authorized in the Act impinges on fundamental rights. The court subjected the Act to the strict scrutiny test mandated by the United States Supreme Court in situations affecting fundamental rights, *see, e.g., Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (voting rights); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (voting rights), and found a compelling state inter-

est warranting the pretrial detention of juveniles and justifying the differences between the treatment of youth and adults authorized by the Act. Accordingly, the Act was upheld as free of the claimed due process and equal protection deficiencies. No appeal was taken to the United States Supreme Court. Indeed, it is unlikely that an appeal could have withstood a claim of mootness. *See Sosna v. Iowa*, 419 U.S. 393, 403 (1975): "There must not only be a named plaintiff who has . . . a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case." (footnotes omitted).

The exhaustion doctrine is firmly grounded in considerations of federal-state comity. It is clear, however, that § 2254 was not designed to "erect insuperable or successive barriers ot the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson*, 404 U.S. 249-251 (1971), *quoting Fay v. Noia*, 372 U.S. 391, 438 (1963). All that is necessitated "is that the state courts must have had a 'fair opportunity' to consider a constitutional claim before federal habeas is available under the exhaustion doctrine." *United States ex rel. Leeson v. Damon*, 496 F.2d 718, 721 (2d Cir.), *cert. denied* 419 U.S. 954 (1974). It is regarded as placing needless stress on federal-state relations and as hence unseemly for a federal court to upset a state court conviction without the state courts being first afforded the opportunity to pass upon the

contentions which allegedly warrant release on federal habeas corpus.

Wayburn is an authoritative and unanimous holding of New York's highest court. All the judges on that court agreed that the state had a sufficiently compelling state interest in the guardianship of its youth to justify the promulgation of a law which permits youth to be held in pretrial detention on a prediction that if released the youth might commit another crime before he could be brought to trial. There have been no intervening decisions by the New York Court of Appeals or the United States Supreme Court to warrant any expectation that *Wayburn* no longer reflects the law of New York. Since we already have an authoritative state determination on the federal claims raised here which reflects the current status of New York law, exhaustion of state remedies by these petitioners would seem to be an exercise in futility. *See Stubbs v. Smith*, 533 F.2d 64 (2d Cir. 1976); *Johnson v. Robinson*, 509 F.2d 395, 397 (D.C. Cir. 1974); *United States ex rel. Sero* v. *Preiser*, 506 F.2d 1115, 1130 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); *Mercado v. Rockefeller*, 502 F.2d 666 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *Sarzen v. Gaughan*, 489 F.2d 1076 (1st Cir. 1973); *Layton v. Carson*, 479 F.2d 1275 (5th Cir. 1973); *United States ex rel. Hughes v. McMann*, 405 F.2d 773 (2d Cir. 1968); *Evans v. Cunningham*, 335 F.2d 491 (4th Cir. 1964); *Gesicki v. Oswald*, 336 F. Supp. 371, 374 n.3 (S.D.N.Y. 1971) (Kaufman, C.J.), *aff'd without opinion*, 406 U.S. 913 (1972).

The state argues that the authority of the above cited cases is inapposite since in *Wayburn* the state appeal process was terminated prior to completion in that no appeal

was sought in the United States Supreme Court. *Ex parte Hawk*, 321 U.S. 114 (1944), is relied on for the view that resort to the United States Supreme Court on direct appeal is necessary before exhaustion of the state process can be said to have been completed (State brief, pp. 4-9). This was certainly the law through *Darr v. Burford*, 339 U.S. 200 (1950). In *Fay v. Noia*, 372 U.S. 391 (1963), however, the Court rejected that position. In discussing the reach of federal habeas corpus first extended to state prisoners by the Judiciary Act of 1867, the Court stated that the extension of federal habeas corpus to state custody cases "seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions" (*Id.* at 416), and *Darr v. Burford*, insofar as it was thought to bar a state prisoner from federal habeas corpus relief if he has failed to seek certiorari in the United States Supreme Court, was overruled. *Id.* at 436.

While *Fay v. Noia* has been severely limited by *Wainwright v. Sykes*, —— U.S. ——, 97 S. Ct. 2497 (1977), its holding that the exhaustion doctrine does not require seeking certiorari in the United States Supreme Court for direct review of the state court decision as a necessary prerequisite to federal habeas corpus was not affected. *Wainwright* dealt principally with state procedural defaults which were held to afford adequate state grounds for denial of federal habeas corpus relief unless "a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation" (97 S.Ct. at 2505) is made. *Darr v. Burford* was not resurrected. Indeed, the writ has been consistently allowed without direct

review by the Supreme Court on certiorari. *See Francisco v. Gathright*, 419 U.S. 59 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Peters v. Kiff*, 407 U.S. 493 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971).

The state concedes the validity of this argument insofar as certiorari is concerned but argues a different principle is applicable when review by the Supreme Court may be had on direct appeal. There is no logical basis for requiring an appeal as a requisite to a right to federal habeas corpus relief while there is no such necessity in respect of certiorari. The reason for not mandating that certiorari be sought first as part of the exhaustion requirement before federal habeas relief can be entertained is that this procedure was found to be needlessly time consuming and burdensome. Since federal-state comity can be satisfied without imposing this needlessly formalistic structure, the requirement was abandoned.

In discussing this issue, the Court in *Fay v. Noia* stated:

> "It is also true Ex parte Hawk . . . intimated in *dictum* that exhaustion might comprehend seeking certiorari here . . . But that passing reference cannot be exalted into an attribution to Congress [in respect of § 2254] of a design patently belied by the unequivocal statutory language.
>
> The rationale of Darr v. Burford emphasized the values of comity between the state and federal courts, and assumed that these values would be realized by requiring a state criminal defendant to afford this Court an opportunity to pass upon state action before he might seek relief in federal habeas corpus. But the

expectation has not been realized in experience. On the contrary the requirement of Darr v. Burford has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes.

. . . .

. . . The requirement that the habeas petitioner exhaust state court remedies available to him when he applies for federal habeas corpus relief gives state courts the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction. And the availability to the States of eventual review on certiorari of such decisions of lower federal courts as may grant relief is always open. Our function of making the ultimate accommodations between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded on the full and complete record which the lower federal courts on habeas corpus are in a position to provide." 372 U.S. at 436-38.

Federal-state accommodation is fully met when the petitioner has presented the federal claims and exhausted all available state remedies in the state courts in respect to them, giving the state the first opportunity to take corrective action. To require direct review by the Supreme Court puts form before substance. Since there is no rational basis to require direct appeal while not requiring certiorari, the court holds that *Wayburn* satisfies in all respects the exhaustion requirements which the petitioners must meet.

Class Action Determination

Class action certification is clearly permissible in federal habeas corpus proceedings. *Gerstein v. Pugh*, 420 U.S. 103 (1975). While full application of the federal rules of civil procedure is not appropriate, the court may "fashion expeditious methods of procedure in a specific case." *United States ex rel. Sero v. Preiser, supra*, 506 F.2d at 1125. As in *Sero*, there are unusual circumstances which warrant allowing this matter to proceed as a class action. The issue raised is a narrow one—may the state subject its youth to pretrial detention on the prediction of a probability that the youth is likely to commit another crime before he can be brought to trial? Only youths may be subject to such a deprivation of their freedom before being adjudged guilty of a criminal offense in some state court proceedings. There is, therefore, a question of law and fact common to the class, and the claims asserted here are typical of the claims of the class. Because of the relative short duration of the pretrial detention authorized by the Act, each member of the putative class if he proceeds on an individual basis, is faced with the prospect of having his claims become mooted before final adjudication in federal habeas corpus proceedings. Yet the class is large, although indeterminate.

The 22nd Annual Report of the Administrative Board of the Judicial Conference for the year 1977 at Tables 80 and 81, pages 162-165 provides statistics showing statewide that in 1976, 58 girls were held in custody before petitions were filed charging them with juvenile delinquency, and 278 girls were held between the filing of the petition and disposition for periods ranging from 1-7 days (111), 8-14

days (44), 15-21 days (23), 23-30 days (29), 31-90 (55), 91-180 days (12), 181-365 days (3), to more than a year (1). 459 boys were held in custody before petitions were filed charging them with juvenile delinquency, and 2,813 boys were held between the filing of the petition and disposition in periods ranging from 1-7 days (1166), 8-14 days (502), 15-21 days (271), 22-30 days (250), 31-90 days (476), 91-180 days (115), 181-365 days (30) to over a year (3). These statistics relate to pretrial detention based on a finding that the juvenile, if at liberty, is not likely to appear at trial, and a finding that he is likely to commit another crime, if at liberty, before he can be brought to trial. The report does not separate the two classes of pretrial detention.

The figures show that overall in 1976, some 517 youths, both girls and boys, were held in pretrial detention before any charge was levied, and that 3,091 youths, again both girls and boys, were held in pretrial detention between the filing of the petition and disposition which is the category to which petitioner's case belongs.

Attached to petitioners' brief in support of the motion for class action certification is a list of cases of pretrial detention of juveniles, based on a prediction that if at liberty the juvenile was likely to commit another crime before he could be brought to trial, handled by the Legal Aid Society of the City of New York, Juvenile Rights Division which handles 95% of all juveniles accused of being delinquent in the City of New York. Listed are some 18 such cases in 1977.

These specific cases occur, therefore, with some frequency. Joinder is obviously impracticable, and because of the special circumstances presented which render it unlikely that the claims raised here can be considered and decided in individual cases before the juvenile's pretrial detention has ended, 18 such cases meets the test of numerosity.

Petitioner in this action is being represented by lawyers for the Amercian Civil Liberties Union, and the Legal Aid Society of New York. Such representation assures the interests of the class will be fairly and adequately represented and vigorously prosecuted. Therefore, there has been substantial compliance with the requirements of Rule 23, F.R. Civ.P. Accordingly, the matter may proceed as a class action, that is, on behalf of all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) of the Act.

IT IS SO ORDERED.

Dated: New York, New York
April 3, 1978

/s/ ROBERT L. CARTER

ROBERT L. CARTER
U.S.D.J.

Pretrial Order (Excerpts)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

[TITLE OMITTED IN PRINTING.]

• • •

I. ISSUES FOR TRIAL

1. Does Family Court Act section 739(a)(ii) violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it authorizes detention based on a prediction of the future behavior of an alleged juvenile delinquent?

2. Does Family Court Act section 739(a)(ii) violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it authorizes the preventive detention of alleged juvenile delinquents in a state which prohibits preventive detention of adults accused of crime?

3. Does the detention authorized by Family Court Act section 739(a)(ii) constitute punishment before trial in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

4. Does Family Court Act section 739(a)(ii) violate the Due Process Clause of the United States Constitution in that the standard for detention is overbroad?

5. Does Family Court Act section 739(a)(ii) violate the Due Process Clause of the United States Constitution in that it allows the detention of an alleged juvenile delinquent who has not been previously arrested for or convicted of a crime?

• • •

IV. STIPULATED FACTS NOT IN DISPUTE

The parties hereto hereby stipulate that the following facts are not in dispute in this action:

1. Juveniles in New York State who are accused of being delinquent have been detained in pretrial detention based on a prediction that if they were released, they would commit another crime before their trial took place.

2. Juveniles in New York State who are accused of being delinquent, and who have never been convicted of a crime can be detained based on a prediction that if they were released there is a serious risk they may commit another crime before their trial took place.

3. Juveniles in New York State who are accused of being delinquent and who have never before been arrested can be detained based on a prediction that, if they were released, there is a serious risk they may commit another crime before their trial took place.

4. The decision by the Family Court judge to detain a juvenile based on a finding that, if he were released, there is a serious risk that he may commit another crime before

the trial takes place is made after a hearing, wherein a report on the juveniles furnished by the Department of Probation among other matters.

5. Secure detention facilities in New York in which juveniles are detained are characterized by physically restricting construction, hardware and procedures.

6. Family Court Act section 739(a)(ii) has no application to Persons In Need of Supervision, and/or abused or neglected children.

• • •

[Attorneys' subscriptions and addresses omitted in printing.]

So Ordered:

Robert L. Carter
U.S.D.J.

[July 16, 1979]

April 17, 1981 District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA ex rel. GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, et al.,

Petitioners,

against

PAUL STRASBURG, as Commissioner, New York City Department of Juvenile Justice,

Respondent.

[APPEARANCES OMITTED IN PRINTING.]

CARTER, District Judge

OPINION

I

Statement of the Case

This habeas corpus class action proceeding is being brought on behalf of a class of all juveniles who are being held or who will be held before these proceedings are concluded in pretrial detention under N.Y. Family Court Act § 739(a)(ii) (McKinney) ("the Act"). Petitioners seek a declaratory judgment that § 739(a)(ii) violates the due process and equal protection clauses of the 14th Amend-

ment. The case was certified as a class action in an unpublished opinion dated April 3, 1978.

In New York persons between the ages of 7 and 16 accused of various acts which would be a crime if committed by an adult are subject to the exclusive jurisdiction of the family court to be prosecuted as juvenile delinquents.[1] In the exercise of its exclusive jurisdiction over juvenile delinquents, the family court is authorized under the Act to subject an alleged delinquent to pretrial detention prior to a probable cause or fact finding determination if it determines that "there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime." § 739(ii) [sic]. The youth may also be detained because of the substantial probability that he will not appear on the return date 739 (a)(i), but this provision is not involved or challenged in this litigation.[2]

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1. For most serious crimes such as murder and arson, members of this group 13 years old and older may be prosecuted as juvenile offenders in the criminal court. N.Y. Penal Law § 10.00(18) (McKinney). This subclass, however, does not concern us.

2. N.Y. Family Court Act § 739 (McKinney) provides:

> (a) After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds [sic: phrase omitted] that unless the respondent is detained:
>
> (i) there is a substantial probability that he will not appear in court on the return date; or
>
> (ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

(*footnote continued on next page*)

A trial on the merits occurred in March, 1980. Edward Rodriguez, a 16 year old, Juan Santiago, a 15 year old, and Jerome Basnight, a 17 year old, representatives of the class, testified in person. In addition, the files of their proceedings in the family court along with the § 739 case histories of 33 other purported members of the class were introduced in evidence. One of the case histories concerns a Vincent Harris who was not detained and accordingly is not properly a member of the class. The Attorney General contends that Victor Melendez is not properly a member of the class since he was detained pursuant to § 739(a)(i). A reading of the files does not support that contention, however. At the § 739 hearing of Melendez, the judge paraphrased the language of both § 739(a)(i) and § 739(a)(ii) as grounds for Melendez' detention. Accordingly, we will count him as properly included in the class. However, Daryl Larkin, whose case history is included in the class was detained because, in the judge's view, there was "a grave chance" that he would not return to court. (Exhibit 9A). That is the basis for detention under § 739(a)(i). In his brief the Attorney General states that Larkin was detained under both § 739(a)(i) and (ii), but I read the transcript differently. Larkin, therefore, will not be considered a member of the class. Thus, the case histories which will be studied are those of 3 named petitioners and 31 other members of the class.

(b) Unless the respondent waives a determination that probable cause exists to believe that he is a juvenile delinquent or a person in need of supervision, no detention under this section may last more than three days (i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists, or (ii) unless special circumstances exist, in which cases such detention may be extended not more than an additional three days exclusive of Saturdays, Sundays and public holidays.

In addition there was testimony concerning the family court process by Steven Hiltz, an attorney for 9 years in the juvenile rights division of the Legal Aid Society, and attorney-in-charge of its Manhattan office from 1976-1979, Hubert Benjamin, supervisor of probation in Bronx Family Court since 1968 and a probation officer for 30 years, and Judge Cesar Quinones, of the Family Court of the City of New York since 1970, who testified concerning § 739 hearings from a judge's perspective.

Michael Bigley, director of detention services of the New York State Division for Youth and Ralph E. Kelly, deputy commissioner of operations of New York City Department of Juvenile Justice, testified concerning secure and non-secure facilities and the functions of the state and city agencies in the housing of juveniles remanded after a § 739 hearing. Professor Leslie Wilkins, professor of criminal justice at the State University of New York at Albany, and Dr. Lynwood David Zinn, Director of Child Psychology at Michael Reese Hospital in Chicago, Illinois, and clinical assistant professor at the University of Chicago, testified as experts for petitioners concerning the harmful effects pretrial detention inflicts on the young and the arbitrariness and untrustworthiness of predictions that a juvenile will commit a crime in the future. Dr. Wilkins questioned whether any reasoned predictive determination to that effect could be made by a family court judge on the basis of an intake interview and stated that the judge's subjective prognosis founded on such data would be roughly only 4% better than pure chance. Finally, Judge Margaret Driscoll of the Supreme Court of Connecticut and with 18 years on the bench testified about national juvenile

standards and Connecticut procedures in respect of the pretrial detention of juveniles.

II

The § 739 Case Histories of the Named Plaintiffs and 31 Other Members of the Class

Edwin Rodriguez was arrested on December 12, 1977, and charged with arson and reckless endangerment (that he with other youths attempted to start a fire in a subway station). Rodriguez was 14 at the time and had no prior arrest record. He had a § 739 hearing on December 13, 1977, before Judge Ferrara. Probation recommended detention. He was detained on the grounds that he was charged with a serious act that occurred at 12:30 A.M., and he was not going to school. A fact finding hearing[3] was scheduled for December 15, but was adjourned to December 16. At the December 16 hearing, Rodriguez entered a plea to reckless endangerment and was released. He had been detained for a total of 3 days. At the dispositional hearing[4] on June 23, 1978, Rodriguez was given 2 years probation and family counselling. There have been no

3. N.Y. Family Court Act § 742 (McKinney) defines "fact finding hearing" in a case of alleged juvenile delinquency as one "to determine whether the respondent did the act or acts alleged in the petition which, if done by an adult, would constitute a crime." N.Y. Family Court Act § 744 (McKinney) requires evidence to be limited to the competent, material and relevant and a finding that "respondent did the acts or acts alleged must be based on a preponderance of the evidence."

4. N.Y. Family Court Act § 743 (McKinney) defines a dispositional hearing in cases of alleged juvenile delinquency as one "to determine whether the respondent requires supervision, treatment or confinement."

subsequent court contacts. Rodriguez, as indicated, testified in person at the trial, and his § 739 case history is set out in Exhibit 12.

Juan Santiago 12 years old with no prior court contact, was arrested on April 11, 1978, and charged with first degree assault on a 71 year old woman. The offense was alleged to have occurred at 6:00 P.M. on the street and to have resulted in injury to the woman. He was taken to Spofford (a secure facility)[5] where he was held until his § 739 hearing on April 12, before Judge Matthews. The court ordered him detained because of the seriousness of the offense and the condition of the alleged victim. A probable cause hearing was set for April 17. He had been detained for 6 days at the time of the probable cause hearing. Probable cause was found and the boy was detained at Spofford until his fact finding hearing on April 24, 1978. As a result of that hearing, he was adjudicated a delinquent and was ordered detained further at Spofford for psychological testing and investigation. At his dispositional hearing on May 19, 1978, he was released to the custody of his mother on 2 years probation. Since his release, he has had no further contact with the court. (Exhibit 13)

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5. There are two types of detention facilities—secure and non-secure. A secure facility is defined as one "characterized by physically restricting construction, hardware and procedures." N.Y. Family Court Act § 712(d) (McKinney). A non-secure facility is "characterized by the absence of physically restricting construction, hardware and procedures." N.Y. Family Court Act § 712(e) (McKinney). The secure facility has a more authoritarian atmosphere. The juveniles are subjected to strip-searches, wear institutional clothing and follow institutional regimen. At Spofford, which is a secure facility, some juveniles who have had dispositional determinations and were awaiting placement (long term care) comingle with those in pretrial detention (short term care).

Jerome Basnight, 14 years old, was arrested on October 14, 1977, and charged with first degree robbery and criminal possession of a weapon. He is alleged to have acted with 2 others to steal a pocketbook at gunpoint. He was released to the custody of his mother by the police. A § 739 hearing was held on October 20, 1977, before Judge Ferrara, 6 days after the event. The boy was ascertained to be registered in school, to be a resident of Staten Island and to have no prior criminal record. The judge detained him because the matter was "quite serious," and the boy seemed involved in bad company. A probable cause hearing was held on October 24. He had been detained 4 days at the time of the probable cause hearing. Probable cause was found, and he remained in custody until a fact finding hearing on November 1. He was adjudicated a delinquent at that hearing on the robbery charge, and disposition was reserved. At the dispositional hearing on November 29, 1977, Basnight was placed on probation for one year under the supervision of the County of Richmond. (Exhibit 10) Basnight testified at trial that he was registered in McKee Vocational High School in Staten Island, and that because of the time spent in detention, he lacked the necessary points to qualify for auto shop training because he could not make up the deficiency.

Gregory Martin, 14 years old, was arrested on December 13, 1977, charged with robbery and assault with criminal possession of a weapon for striking another youngster with a loaded revolver and stealing his jacket and sneakers. A § 739 hearing was held on December 14, before Judge Ferrara. Martin had no prior record. Citing the lateness of the hour when the crime occurred, that the boy had given

the police a false address and the loaded weapon, the judge ordered Martin detained. At the December 19 probable cause hearing, probable cause was established. He had been detained 6 days before this hearing. The fact finding hearing held December 27-29, adjudicated Martin a delinquent and guilty on all counts. At the February 14, 1978 dispositional hearing, he was given 2 years probation. (Exhibit 11)

Luis Rosario, 14 years old, together with 4 others, was charged with an attempt on March 2, 1979, to rob two men. It was alleged that a gun was used and that Luis and his companions beat the two men about the head with sticks. Luis was released. A § 739 hearing was held before Judge Roache on March 15. At that time Luis had another delinquency petition pending for knifing a student, and two prior petitions had been adjusted. The court ordered him detained, noting his prior court appearances. Probable cause was found on March 21. On April 11, the boy was released to his father, and the case was terminated on September 25, 1979, without adjustment. (Exhibit 2)

Kenneth Morgan, 14 years old, was arrested on March 25, 1978, and charged with attempted robbery and threatening a 14 year old girl and her brother. A § 739 hearing was held on March 27, before Judge Moskoff. Kenneth was then on release status on another robbery charge. He was ordered detained. A probable cause hearing was apparently set for March 30, but continued until April 4, where it seems to have been combined with a fact finding hearing. He was found guilty of harassment and petty larceny. Morgan was detained 10 days before the April 4 probable

cause continued hearing, and 8 days subsequent to the § 739 determination. On July 5, at a dispositional hearing, he was ordered placed with the Department of Social Services for 18 months. (Exhibit 3)

Phil Hanna, 13, and *Calvin Jenkins,* 15, were arrested and charged wtih robbery and criminal trespass on August 23, 1977, for breaking into a store and damaging equipment. A § 739 hearing was held before Judge Rigler on August 24. Hanna had had prior court contacts and Jenkins, with 2 delinquency petitions pending, was on probation. Both were ordered detained. At the August 29 probable cause hearing, Jenkins and Hanna were paroled. On October 21, 1977, their cases were dismissed for lack of prosecution. They were held in pretrial detention for 6 days before the probable cause determination. (Exhibit 4)

James Price, 13 years old, was arrested on September 11, 1978, for attempting to pull a necklace from a man's neck and was charged with robbery, assault and grand larceny. A § 739 hearing was held before Judge Ferrara on September 12. Price had had prior court contacts, but the previous charges had not been pressed. He was ordered detained, the court citing his recent court contacts. A probable cause hearing was set for September 15, and at that hearing Price admitted to grand larceny and was placed in a non-secure facility. He absconded on September 27. At the time of the probable cause hearing Price had been detained for 3 days. (Exhibit 5)

Johnny McArthur, age 15, was arrested on October 12, 1977, for pointing a loaded, cocked automatic at a 13 year old. He was charged with criminal possession of a dan-

gerous weapon and menacing and released by the police to the custody of his mother. A § 739 hearing was held on November 28, 1977, six weeks after his arrest, before Judge Heller. He was ordered detained, the judge stating it was his policy to remand those caught with loaded .45 caliber revolvers. The probable cause hearing was scheduled for November 30, 1977, but was adjourned, and he was released to the custody of his mother. As of November 30, he had been detained for 2 days. On January 10, 1978, the matter was dismissed without prejudice. (Exhibit 6)

Christopher Cox, 13, Glen Maloney, 13 and Wade Forde, 13, were arrested on October 13, 1976, along with Clarence Smith, 13, and Alex Michael, 15, and charged with grabbing and threatening people with a weapon in an attempt to take their bus passes. They were released to the custody of their parents. A § 739 hearing was held on November 12, before Judge Roache. Smith, who had retained private counsel, was paroled as was Michael. The court ordered Cox, Maloney and Forde detained despite the intake probation officer's recommendation of parole and the fact that the three had had no prior court contact. Forde was paroled to his parent's custody on November 15, and at the November 23 fact finding hearing he was adjudicated a delinquent. Forde was placed on probation for 2 years. Cox was placed on probation on January 13, 1977, but it was subsequently revoked. Forde appears to have been held in custody for 3 days before being paroled to his mother's care. The case history does not contain any further information. (Exhibit 7).

Francisco Ramos, 15, was arrested on March 4 for breaking into a store and stealing goods and charged with

burglary, petty larceny, criminal mischief and criminal possession of stolen goods. He was released to the custody of his parents. A § 739 hearing was held on March 17, 1978, before Judge Roache. He had a record of 9 prior arrests but all had resulted in adjustments and dismissals. Probation recommended release, but Judge Roache ordered him detained on the ground that prior arrests showed a likelihood that Ramos would commit a crime before the return date. A probable cause hearing was set for March 21, 1978, but the matter was continued. The final disposition of the proceeding was a discontinuance. Ramos was apparently in custody by order of the court for some 4 days until the matter was discontinued. (Exhibit 8)

Jose Cruz, 14, was charged with attempted murder and assault based on a March 7, 1977 incident in which Cruz allegedly pushed a 77 year old man down the stairs, beat him about the head and threatened him. At a § 739 hearing on March 25, before Judge Rigler, he was ordered detained in view of the severity of the charge. Probable cause was found on March 28, at which time he had been detained 3 days. The attempted murder charge was dismissed, and he was paroled in his mother's custody on April 1. On May 25, the assault charges were reduced, and the case was adjourned in contemplation of dismissal. (Exhibit 11)

Edwin Ascencio, 14, was arrested on December 12, 1977, with Edwin Rodriguez, and charged with arson and reckless endangerment for allegedly starting a fire in a subway. A § 739 hearing was held on December 13, 1977, before Judge Ferrara. Ascencio had a petition pending and had not been attending school. The judge ordered detention, citing the seriousness of the allegations as a basis. A prob-

able cause hearing was held on December 16, 1977. Ascencio admitted to committing the offense and was released to his family. He had been held in custody for 4 days, 3 of them under order of the court at the time of the probable cause hearing. At the dispositional hearing on January 26, 1978, he was placed on 2 years probation. (Exhibit 12)

James Peebles, 15 years old, was arrested and charged with arson for allegedly setting fire on July 4, 1978, outside the door of the complainant's apartment while the complainant and his family were inside. A § 739 hearing was held on July 5, before Judge Quinones. The boy was ordered detained, the judge citing the seriousness of the crime as the basis for his action. At the July 10 probable cause hearing Peebles admitted to reckless endangerment. At that time he had been in custody for 6 days. Detention was continued for psychological evaluation. On July 20, 1978, he was released to his mother. Parole status was revoked in December, 1978, and at the dispositional hearing he was placed with the Division for Youth. (Exhibit 14)

Jeffrey McCain, 15, was arrested on May 23, 1978. A § 739 hearing was held on May 24, 1978, before Judge Doran. The boy had been arrested on robbery charges on 3 prior occasions that same month, and petitions for these offenses were pending. He was ordered detained. A probable cause hearing was set for May 28, 1978, but was postponed. The matter was eventually dismissed because of lack of proof beyond a reasonable doubt to support the charges. McCain was held in custody for at least 4 days before the scheduled May 28 probable cause hearing. The record does not disclose the date of the boy's release. (Exhibit 15)

Carl Harris, 15, and Michael Taylor, 14, were arrested on March 5, 1977, for possession of stolen property and released. A § 739 hearing was held 12 days later on March 17, before Judge Rigler. In view of prior court contacts, the court ordered both detained. On March 21, 1977, both were adjudicated delinquent. By that time they had each spent 4 days in detention. At the dispositional hearing on May 16, 1977, Carl was placed on probation and Michael with the Commissioner of Social Services. (Exhibit 16)

Victor Melendez, 15, was arrested on July 11, 1977, for breaking and entering a school building at night and causing $1,500 in damages. A § 739 hearing was held on July 13, 1977, before Judge Gartenstein. This was Melendez's fourth arrest since March, 1977. He was ordered detained. A probable cause hearing was set for July 19, but was adjourned and was finally held on August 12, 1977, at which time Melendez was adjudicated a delinquent. On December 16, 1977, he was placed on one year's probation. It is unclear from the record what part of the period from July 11 to August 12, Melendez spent in detention.[6] (Exhibit 17)

Tyrone Parson, 15, was arrested on November 6, 1976, for promoting gambling and for possession of a gambling device and released. At a § 739 hearing held on December 1, he was ordered detained. Seven prior court petitions were then pending. At the probable cause hearing on December 6, the petition was dismissed because the offense alleged did not come within the provisions of the penal law.

6. If he was in fact held in custody from July 13 to August 12 before the probable cause hearing, the statutory time constraints appear to have been breached. *See* N.Y. Family Court Act § 739(b) (McKinney).

He had been detained for 5 days between his § 739 and probable cause hearings. (Exhibit 18)

Geraldo Delgado, 15, was arrested on March 4, 1976, for stabbing and killing another boy. A § 739 hearing was held on March 5, 1976, before Judge Matthews. He ordered the boy detained because of the seriousness of the crime. Probable cause was found on March 10. Delgado had been detained for 5 days between his § 739 hearing and probable cause determination. Delgado was adjudicated a delinquent on April 4, 1976, and psychological tests were ordered. On July 7, 1976, he was released to his mother's custody and placed on one year's probation subject to treatment at Lincoln Hospital Adolescent Treatment Center. (Exhibit 19)

Tony Gomez, 15, was arrested on October 26, 1978, for allegedly assaulting and robbing a 77 year old woman and charged with grand larceny, robbery, assault and possession of stolen property. A § 739 hearing was held on October 27, 1977, before Judge Ferrara. He was ordered detained. Three prior petitions for robbery and attempted rape had been terminated without adjustment. A probable cause hearing was scheduled for October 31, but was adjourned. Gomez was released on a writ of habeas corpus on November 10, 1977. At the time he had been held in custody without a probable cause adjudication for 15 days, 14 of those days were pursuant to the court's order under § 739(a)(ii). On December 7, 1977, he was adjudicated a delinquent and given a one year suspended sentence. (Exhibit 20)

Maurice Dunaway, 13, was arrested on July 22, 1976, for theft of subway bus transfers from a Transit Authority

transfer box. A § 739 hearing on July 23, 1976, was held before Judge Roache. The boy was ordered detained due to alleged threats against the complainant, disobedience at home and prior court contact. Another petition for a similar offense was outstanding. A probable cause hearing was set for July 27, but was adjourned to August 3. On the latter date Dunaway was adjudicated a delinquent. He had been detained for 11 days under court order at the time of his probable cause hearing on August 3. Thereafter he remained in custody until October 12, 1976, and then was released to his mother while placement was explored. On April 20, 1977, he was placed with the Division for Youth for 18 months. (Exhibit 21)

Daniel Nelson, 15 was arrested on April 19, 1979, charged with petit larceny for allegedly stealing a radio valued at $85, and released to the custody of his parents. A § 739 hearing was held on May 3, 1979, before Judge Roache. At the time, Nelson was on probation on a prior charge and was ordered detained. The probable cause hearing was held on May 6, and he was adjudicated a delinquent. At the time of his probable cause hearing he had been detained for 3 days. On December 12, he was placed with the Commissioner of the Department of Social Services for 18 months. (Exhibit 22)

Daniel Gregoire, 15, was arrested on August 23, 1977, on charges of burglary and criminal possession of stolen property. A § 739 hearing was held on September 20, 1977, before Judge Roache. Six prior delinquency petitions against this juvenile had been dismissed. His father told the judge that he could not control the boy and did not want him home. He was ordered detained and remained in cus-

tody until September 23, 1977, when he was paroled to his brother. Probable cause was found on September 29, and at the dispositional hearing he was placed in St. Vincent's for 18 months. Gregoire had spent a total of 3 days under court ordered detention. (Exhibit 23)

Carlos Lopez, 13, was arrested on August 30, 1977, for breaking and entering a store at 4:00 A.M., and was charged with burglary, petit larceny and criminal mischief. A § 739 hearing was held on August 31, 1977, before Judge Rigler. He was ordered detained because of family problems and five pending petitions. A probable cause hearing was set for September 6, 1977. On September 9, he absconded, was returned and absconded again on September 22, 1977, and again was returned. On November 10, 1977, the case was adjusted in contemplation of dismissal. It is difficult to ascertain the precise number of days this juvenile was detained, but it seems to have been at least 7 days before the probable cause hearing. (Exhibit 24)

Kevin West, 14, was arrested on May 31, 1979, and charged with grand larceny, jostling and resisting arrest, for taking property from a 71 year old woman and striking the arresting officer. The § 739 hearing was held on June 1, 1979, before Judge Matthews. Several outstanding petitions were then pending. West was ordered detained. On June 5, he was adjudicated a delinquent and placed with the Division for Youth for 12 months. His time in detention under court order before his probable cause hearing was 4 days. (Exhibit 25)

Carlos Fargas, 14, was arrested on April 24, 1979, for threatening to strike the complaining witness with a broomstick. He was charged with robbery, grand larceny, unlaw-

ful imprisonment and possession of stolen property. He was released pending a § 739 hearing which was held on June 6, before Judge Pollard. The failure of his parents to accompany him to court meant a lack of supervision to the judge and created a likelihood of further delinquent acts. For these articulated reasons he was detained. On June 11, he was paroled to the custody of his parents. He had been in pretrial detention under court order for 5 days. (Exhibit 26)

Jody Allen, 12, was arrested on May 25, 1979, for beating an elderly woman who had to be hospitalized. There had been seven previous court contacts but no findings. He was charged with assault and attempted robbery and released. The § 739 hearing was held on June 1, before Judge Pitaro. He was ordered remanded. The complaining witness did not prosecute the matter. Allen was released to the custody of his grandmother on June 4. He had been detained under court order for 3 days before being released. The petition was withdrawn on June 25. (Exhibit 27)

Emmett Jacobs, 14, was arrested for stealing a watch on May 30, 1979, and charged with robbery and grand larceny. A § 739 hearing was held on May 31, before Judge Leddy. Three prior petitions had been filed, but no findings had resulted. Noting his prior court contacts, the court ordered Jacobs detained. At the probable cause hearing on June 4, Jacobs admitted to petit larceny. At final disposition he was placed with the Division for Youth for 12 months. He had been detained 4 days before his probable cause adjudication. (Exhibit 28)

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James Ancrum, 15, was arrested on August 16, 1979, for attempting to take a necklace off a man's neck. The man was allegedly beaten and thrown down a flight of stairs. A § 739 hearing was held on August 21, before Judge Ferrara after an order was issued removing the case from criminal court. Probation recommended release, but Ancrum was ordered detained, in view of the lateness of the hour when the act was allegedly committed. On August 24, probable cause was found. He was released to his mother's custody, and the petition was withdrawn. He was detained for 3 days under court order before the probable cause hearing. (Exhibit 35)

Douglas McLaughlin, 14 years old, was arrested on June 29, 1978, for burglarizing an apartment. Apparently he was on parole between the incident and the § 739 hearing on July 7. He had been arrested once previously, though no petition had been filed. The § 739 hearing was held before Judge Quinones, who ordered the boy remanded due to a statement by the boy's mother that he was beyond her control. A fact finding hearing was set for July 11, then adjourned until July 13, at which time McLaughlin was released to the custody of his mother. He was detained under court order for 6 days before the probable cause hearing. The petition was ordered dismissed on January 12, 1979. (Exhibit 43)

III

Juvenile Delinquency Proceedings

The threshold step in the court process in juvenile delinquency proceedings occurs at probation intake in family

court. The juvenile may be brought to the intake part from temporary detention or in police custody, in which case he comes to the court in handcuffs and under police escort. The juvenile may have been released to the custody of his parent or guardian, with instructions to appear in court at an appointed time. N.Y. Family Court Act § 741 (McKinney). In these cases the juvenile appears on his own at probation intake, usually accompanied by a parent or relative. If the complainant appears, and it is the court's understanding that, more often than not, the complainant is a police officer, the case is assigned to a probation intake officer. If no complainant appears, a new date is set, and if after several continuances the complainant still does not put in an appearance, the non-felony proceedings are terminated. If a felony, the case is referred to the district attorney.

The intake probation officer must hold either a master's degree in social work or in sociology and related fields or such a bachelor's degree, plus two years of paid-for experience in social work and related fields. Many of the probation officers currently on duty in probation intake possess only the lower academic credentials augmented by relevant work experience.

The probation officer to whom the case is assigned interviews the police officer, the juvenile and parent or guardian, if present. Typically, the civilian complainant signs a statement at the police station and does not appear at probation intake. The juvenile is not represented by counsel. The purpose served by these interviews is to enable the probation officer to ascertain the nature of the offense charged, to obtain the juvenile and the police ver-

sion of what took place, to assess the juvenile's role and personal involvement in the offense and to secure some background facts on the child. The juvenile is not subjected to any professional psychiatric or psychological examination unless mental health problems are patently evident. The entire interview process takes between 10 and 40 minutes. After the interviews are concluded, the officer checks to ascertain whether the juvenile has a history of prior involvement with the court. He then decides whether the case should be adjusted, that is, disposed of without court intervention. He may adjust the case, leaving it open to see whether the juvenile lives up to the conditions imposed with a view to having the case ultimately dismissed. Whether the case is adjusted or referred to court intake for further proceedings is determined based on criteria set forth in Family Court rules and the regulations in the New York State Department of Probation. N.Y. Family Court Act § 734(a) (McKinney); Family Court Rules, §§ 2507.3-2507.6

If the officer decides that the case must be processed through court, the case is sent to court intake for a petition to be drawn and prosecution by the district attorney or corporation counsel. N.Y. Family Court Act § 731(1) (McKinney). When the probation officer decides to refer the matter to court intake for the drafting of a petition and further proceedings, he must accompany the reference with a recommendation that the juvenile either be remanded or paroled. This recommendation is based on the nature of the case, whether there is a prior record, the attitude of

the juvenile and of the parent.[7] There do not appear to be any governing criteria which must be followed by the probation officer in choosing between proposing detention and parole, nor do psychological or psychiatric factors appear to be considerations involved in the probation officer's recommendations.

Although the court was advised at trial that the corporation counsel is increasingly demanding that petitions be based on the statement of a complainant with personal knowledge of what took place, we were nonetheless advised that petitions based solely on information and belief are still being processed.

If in custody, the juvenile must be brought before a judge for a § 739 hearing within 24 hours. The judge may order him held for an additional 24 hours before holding the § 739 hearing. If the hearing results in pretrial detention, a fact finding hearing, which is equivalent to a trial on the merits, must occur within 3 to 6 days thereafter. N.Y. Family Court Act § 747 (McKinney). In some cases fact finding may be put off for good cause as long as 14 days after the § 739 proceeding, but if such a postponement occurs, there must be a probable cause hearing within 72 hours of the § 739 determination. N.Y. Family Court Act § 748 (McKinney)

The § 739 hearing takes place at court intake and is similar to an arraignment in an adult case. The juvenile is brought before the judge and assigned counsel. The charges are read, and the juvenile is advised of his rights. N.Y.

7. In certain designated felony cases, the officer makes no recommendation about release or parole but merely summarizes the record in the case. (Tr. 72).

Family Court Act § 739 (McKinney). In addition to the juvenile and assigned counsel, the prosecutor, court liaison officer and probably a parent or guardian are also present. The court liaison officer is the probation officer on duty at court intake. He is not the probation intake officer who interviewed the juvenile and whose recommendation to remand or parole the judge will act upon. There is an official stenographic transcript of this proeeding, but no inquiry is made into the non-hearsay allegations of the truth of the charges, and no testimony is taken under oath. After the charges are read and the juvenile is advised of his rights, the judge asks for the recommendation from probation intake. This is read to him by the court liaison officer. The judge may make a few inquiries of defense counsel, prosecution and court liaison officer. Then he announces his decision whether to order detention or parole the juvenile. He usually gives some indication on the record of his reasons for ordering pretrial detention.

Each judge follows his own individual approach to this determination. Judge Cesar Quinones, the only judge of family court to testify, stated that his determinations are based on the petition, prior record and the probation officer's recommendation. He also considers whatever facts are brought out by defense counsel, but appointed counsel (the usual case) is assigned at court intake when the case is called and has very little opportunity to learn much pertinent information about the juvenile. Background on the child is not available at the court intake unless there has been prior court contact, and if the latter, this is a negative factor. Often there is no one present with personal knowledge of what happened.

Judge Quinones stated that he considers allegations of violence against persons more serious than property infractions; that he looks to the seriousness of the charges, whether anyone was hurt, whether the acts occurred in early morning which would be indicative of lack of parental supervision. He testified that a § 739 determination to detain the juvenile is not intended to benefit the child, but to protect society. At court intake, Judge Quinones testified, approximately 30 cases are processed in a typical 9-5 day, thus each proceeding is of 5-15 minutes in duration. The great majority of juveniles ordered detained are blacks and Puerto Rican. No uniform court or judicial criteria, yardstick or guidelines govern a § 739 disposition. In deciding whether the juveniles should be detained, each judge must rely on his own subjective judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute. (Tr. 435-513).

At the fact finding hearing, a determination is made whether the juvenile is to be adjudged delinquent because he is found to have committed the offenses charged, or, as in the typical case, a lesser offense than that originally charged. Where a probable cause hearing precedes fact finding, there must be a sufficient prosecutorial presentation to warrant a finding of probable cause that the juvenile committed the offense charged, and, as the case files show, these probable cause and fact finding proceedings often result in an admission by the juvenile that he committed a lesser offense. If the fact finding hearing results in an adjudication of delinquency, the juvenile has a dispositional

hearing, at which time the judge determines what form of punishment or discipline is warranted. The dispositional hearing determines whether the juvenile is to be sent to a state facility, secure or unsecure, or released on probation. N.Y. Family Court Act § 753 (McKinney). Probation prepares a report for the judge at disposition which is compiled after a full investigation of the juvenile in school, community and home and a study of relevant intake records.

In 1979, 58.2% of the juveniles held in pretrial detention[8] were accused of crimes against property and other non-violent crimes; 47.1% were accused of crimes against persons and other violent crimes. In 1977, 18,447 juvenile delinquency petitions were disposed of. Pretrial detention

8. There was considerable testimony concerning the type of facility to which a juvenile is remanded for detention prior to dispositional hearing. Michael Bigley, director of detention services section, New York State Division for Youth, testified that detention is short term care which may last through dispositional stage pending final placement. Long term care commences at placement pursuant to a dispositional determination. He testified that in 1978 in New York City there were 7,362 initial admissions (of both juvenile delinquents and juvenile offenders) to secure facilities and 50% of the juvenile delinquents admitted to those facilities were there for 3 days or less (Tr. 206-07). In 1979, there were 1,216 admissions of juvenile delinquents to non-secure facilities (Tr. 211-12). In 1979, a total of 8,557 juveniles were admitted to secure facilities; 2,428 whites, 4,501 blacks and 1,386 hispanics. (Tr. 222).

The testimony appears to be at odds with the final figures set out in the Report of Chief Administrator (Tables 79, 80, 81, 82) for the calendar year 1979, *see* text pp. 59-60. If we include all of those detained adding those detained before petition to the figures given for those detained after petition, and include placement with the Commissioner of Social Services, Title 2 and Title 3 placements with the Division for Youth as placement in secure facilities, the total 4,783 does not coincide with 8,557, the figure given by Mr. Bigley at trial.

was ordered in 3,546 instances.[9] At final disposition 47 juveniles were subjected to some form of restricted placement and 594 were placed in Division for Youth under Title 2, and 667 were placed with the Division under Title 3.[10] The latest published statistics are for the year 1979. There were 17,880 juvenile delinquency petitions filed in the state.[11] Pretrial detention was ordered in 4,290 cases.[12] Of the petitions filed, 932 were dismissed at fact finding;[13] 23 were dismissed for other reasons and 292 at the dis-

9. Table 81 and Table 82, pp. 162-165, 1977 Annual Report for 1977 of the Administrative Board of the Judicial Conference and Office of Court Administration of the State of New York (1978), show that 347 juveniles were detained before the filing of the petition, and 3,546 were detained between the filing of the petition and disposition. If the latter figure does not include the former, as the text assumes, the number of juveniles subject to pretrial detention would be 3,793.

10. Tables 83 and 84, pp. 166-169, N.Y. Executive Law § 502 *et seq.* (McKinney), authorizes the Division for Youth to establish youth centers—camps, residences or other buildings for the care, treatment, education, rehabilitation and guidance of youth between 15 and 18 years of age. The program may include training and service in conservation, civil defense, disaster relief, etc. Youths assigned there may be there only part time. It is to such centers that Title 2 placement refers.

Title 3 placement is provided for in N.Y. Executive Law § 510 *et seq.* (McKinney), and these are training schools operated by the Division for Youth for juvenile delinquents under the age of 16 at the time the delinquent act is committed and under 17 at the time of placement. These schools are authorized to offer general rehabilitation programs.

11. Tables 79 and 80, pp. 86-87, Report of the Chief Administrator of the Courts for the Calendar Year 1979, State of New York (1980).

12. *Ibid.*

13. Tables 81 and 82, pp. 88-89, Report of Chief Administrator of the Courts, *op. cit. supra* note 11.

positional hearing;[14] 731 were dismissed for failure to prosecute;[15] 846 were dismissed without prejudice;[16] 4,882 were dismissed in furtherance of justice,[17] and 1,617 were dismissed for other reasons;[18] 1,456 petitions were withdrawn;[19] 19 were discharged with warnings;[20] in 725 cases judgment was suspended;[21] 3,511 were placed on probation without placement;[22] 17 were placed on probation and placed in private homes;[23] 760 were placed with the Commissioner of Social Services;[24] 412 were placed with the Division for Youth under Title 2;[25] 594 were placed with the Division under Title 3;[26] 2 were placed in restrictive placement for 5 years, 2 for 3 years and 70 in other forms of restricted placement.[27]

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14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*

IV

The Parties' Contentions

Petitioners contend that the statute is unconstitutional on its face and as applied in that it offends the due process and equal protection guaranties of the 14th Amendment. Petitioners argue that the subjective prediction or prognosis of the imminence of future misconduct which § 739 (a)(ii) authorizes as the basis for the pretrial detention of juveniles is a vague, arbitrary and capricious standard and that no rationally based prediction or reasoned determination is possible under the statutory scheme. They insist that the statute is overbroad and violates equal protection constraints in authorizing pretrial detention of juveniles, since they are thereby treated differently from adults, and there is neither a rational basis pertinent to the differentiation between the two groups, nor any compelling state justification to warrant imposition of the restrictions imposed on juveniles under the statutory scheme. Petitioners also argue that the burden the statutory scheme imposes falls more heavily on non-white minorities and the poor than on whites and the more affluent, but they stop short of making a specific claim of a denial of equal protection on that basis.

The attorney general argues *pro se* that the statutory scheme is constitutionally and legislatively permissible; that all judicial and administrative decision making in the criminal justice system has the same potential for inaccuracy in predicting future acts, as does the statute involved here, but nonetheless the judge's subjective determinations

as to bail, parole, and length of sentence have been accepted as appropriate exercises of judicial discretion free of constitutional infirmities; that the statute does not result in random detention; that pretrial detention does not constitute punishment without trial and does not deny juveniles any due process or equal protection rights, and in any event, the compelling interest of the state in reducing the risk of pretrial crimes by juveniles justifies the difference in the treatment of juveniles and adults and validates the statute.

V

Determination

A

The issues raised in this litigation are difficult and complex. Petitioners contend that the statutory scheme is at war with the guarantee of equal protection since juveniles are subjected to pretrial detention while adults are not. Both parties argue that the appropriate test to measure the constitutional validity of § 739(a)(ii) under the equal protection clause is whether the state has demonstrated a compelling, overriding state interest justifying the legislation, and no feasible, less drastic measures are appropriate to accomplish the state's objective.

In *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518 (1976), the New York Court of Appeals upheld the Act against an equal protection challenge on the ground that the statute served a compelling state interest. That interest as articulated by the court was the juveniles' emotional and intellectual immaturity, necessitating that they not be held to the more onerous adult standards of respon-

sibility for their conduct. Moreover, the court reasoned that immaturity and lack of comprehension caused juveniles to view criminal conduct less seriously than adults. Accordingly, procedures designed to prevent further criminal acts by juveniles accused of delinquency were held to be justified to protect the public.

If the parties are, and the state court was, correct that compelling justification and unavailability of any feasible less drastic alternatives are the criteria to measure the statute's validity under the equal protection clause, my task would be considerably eased. § 739 [sic] clearly cannot withstand a constitutional challenge when the equal protection test of strict scrutiny is applied.

The record made at trial reveals that roughly 3,546 juvenile delinquents were subjected to pretrial detention in 1977. The figures on final disposition of all juvenile delinquencies show that 667 were placed in training schools of the Division for Youth and 47 others were accorded some other form of restricted placement. Assuming that the above 714 juveniles were all among those subjected to pretrial detention (an assumption not necessarily correct), the remaining 2,832 cases resulted in probation to the custody of the parent, guardian or placement in a foster home, or placement in a youth camp.

The 1979 figures paint the same picture. Some 17,880 juvenile delinquency petitions were filed. 4,290 juveniles were held in pretrial detention; 670 were placed with the Commissioner of Social Services, 412 with the Division for Youth under Title 2; 594 with the Division for Youth under Title 3, and 77 were accorded some form of restricted placement. (*See ante*, pp. 59-61). Assuming again that all of

these 1,753 were subjected to pretrial detention, the result is that more than half such cases resulted in some form of dismissal or probation. Under any yardstick when at final disposition the overwhelming majority of juveniles are paroled and sent home, the claim that there is a compelling need to subject them to pretrial detention becomes hard to credit.[28]

Sixteen juveniles in the case file histories which make up the record in this case were on parole from 5 to over 30 days between the time of the commission of the offense and their § 739 hearing, with no evidence that in the interim any further crimes had been committed. Yet they were remanded. In some cases there had been no prior court contact, and parole was recommended. Nonetheless, detention was ordered. These instances show a clear lack of any compelling justification in the application of the statute. If a juvenile has been on parole a month, two weeks or 5 days without committing another crime, unless family courts are assumed to be sorcerers who can foretell future events, it is difficult to understand the rationale for depriving him of his freedom because of the likelihood that he will commit a crime within 3 to 6 days. Such decisions, under any circumstances would seem to constitute abuse of discretion.

It is, of course, clear that neither the 14th Amendment nor the Bill of Rights' strictures protect only adults. *In re Gault*, 387 U.S. 1 (1967). Moreover, the mere recitation

28. I admire the candor of Michael Bigley, who, on being asked whether he would consider pretrial detention probably unwise if the ultimate disposition was parole to the youth's own home or to a foster home, replied that he would not say it was probably unwise but that it was possibly unwise. (Tr. 261).

of benign, compensatory purposes is not an automatic shield which protects against inquiry into the actual impact of a statutory scheme, *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975), and in its application demonstrated on this record, there has been no articulation of the *parens patriae* thesis as justification for exercise of the court's authority under § 739(a)(ii).

Remand has been deemed warranted in this case because of the seriousness of the crime, because of prior court contact, because the court always orders detention in certain cases, because such is warranted to punish the juvenile or, as Judge Quinones testified, to protect the public. Yet restraints of minors which might be considered impermissible if applied to adults have been justified as furthering an appropriate state interest, *see e.g. Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 102-103 (1976) (Stevens, J., dissenting), and *parens patriae,* while not an unlimited justification, *Kent v. United States,* 383 U.S. 541, 555 (1966), has been the underlying validating basis for a state's special treatment of the young. The high minded purposes of the juvenile justice system and the designation of proceedings involving juveniles as civil, rather than criminal, serves a benign social function, but "serious questions [arise] as to whether the actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults." *Kent v. United States, supra* at 555.

Yet, in no case has the United States Supreme Court subjected a juvenile classification to the strict scrutiny for classifications based on race, *Loving v. Virginia,* 388 U.S.

1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-2 (1964), alienage, *Oyama v. California*, 332 U.S. 633, 664-66 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943), or where the right or interest interfered with is characterized as fundamental, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), or struck down the differentiation between the treatment of juveniles and adults because the criteria applicable to the above classification were not met.

This provision seems to lack the high minded purpose of protecting the juvenile which is the objective generally cited to justify deviations from adult standards in the juvenile justice system. Rather, the purpose seems to be to protect society from the juvenile. No articulated rationale has been set forth on this record which would warrant disadvantaging the young on this ground. Nonethless, I regard the equal protection challenge to the statute as insubstantial.

The right of a state to differentiate between adults and minors is too ingrained in the fabric of the law for such classifications at this late date to be held to the test of strict scrutiny. Even though a pretrial detention interferes with the juveniles' personal liberty, that alone would not seem to warrant application of the strict scrutiny test. *See e.g. Bell v. Wolfish*, 441 U.S. 520 (1979). The more appropriate inquiry is whether § 739(a)(ii) can be justified on grounds of rationality, *see Weinberger v. Salfi*, 422 U.S. 749 (1975), and under this less rigorous yardstick, the statutory scheme would qualify as meeting the constitutional requirements of equal protection. Equal protection guarantees deal with invidiously discriminatory classifica-

tions and differentiations. This statute does differentiate between youth and adults but to paraphrase Justice Powell, concurring in *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978), to subject § 739 to a compelling state purpose inquiry would cast doubt on the network of laws that the states have devised to deal with problems of the young—delinquency, neglect and care. Accordingly, I turn to what I regard as a more substantial challenge to the statute.

B

The statutory scheme curtails the freedom of one presumptively innocent, albeit a juvenile, on the prediction or hunch of a judge that unless held in custody he will commit another crime within 3 to 6 days. The more fundamental consideration, therefore, is whether on its face or as applied, § 739(a)(ii) meets due process standards. There is little doubt that due process is a requisite to the constitutional validity of proceedings which may result in the curtailment of a juvenile's freedom, since all "individuals possess a liberty interest in being free from physical restraint." *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 33 (1979) (Marshall, J. dissenting). While the limits of the liberty interest protected from deprivation without due process have never been precisely defined, it has "always been thought to encompass freedom from bodily harm and punishment. *See Rochin v. California*, 342 U.S. 165 (1952). It is fundamental that a state cannot hold and physically punish an individual except in accordance with due process of law." *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977).

Juvenile proceedings which may result in confinement to state institutions because of alleged misconduct must have the essential ingredients of fair treatment. *In re Winship*, 397 U.S. 358, 359 (1970); *In re Gault*, 387 U.S. 1, 18, 19 (1967); *In the Matter of W & S*, 19 N.Y.2d 55, 277 N.Y.S. 2d 675 (1966). Application of due process standards may not be defeated because of the labels attached by the state to the pertinent proceedings, *In re Gault, supra*, 387 U.S. at 50-51; *In re Winship, supra*, 397 U.S. at 366, and a "claim that the traditional requirements of due process are applicable in the context of pretrial detention" has not been foreclosed. *Gerstein v. Pugh*, 420 U.S. 103, 127 (1975) (Stewart, J. concurring).

The predictive § 739 determination is made before any proceeding, either adversarial or neutral, has found probable cause or rendered a determination on the merits that the juvenile committed the delinquent act charged. The Act violates due process requirements because: (1) it gives the judge a license to act arbitrarily and capriciously in a § 739 [sic] prediction of the likelihood of future criminal conduct which cannot result from a reasoned determination, (2) pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process, and (3) in addition, constitutes punishment that is constitutionally impermissible under the due process clause.

1. The first defect is perhaps the most pernicious. The judge is empowered to make a prediction about the probability of an individual committing a crime if released. No guidelines for making that determination are set out in the statute, and none has been adopted by the court. The judge's determination is moored to no concrete or reason-

ably determinable yardsticks. We were advised at trial that each judge utilizes his own personal standards. Accordingly, there can be no uniform application of § 739, since each judge's subjective views and biases must necessarily govern. The whole process is riddled with subjectivity and caprice and confers upon the judge "a license for arbitrary procedure." *Kent v. United States, supra* at 553.

A judge is not an expert criminologist and even these professionals who have studied more about an individual's criminal propensities than the rest of us confess, as we shall see later, an inability to perform the task § 739 imposes on the judge. Thus, "[a] serious question of procedural due process is raised by this feature of standardless discretion, particularly in light of the hazards of prediction . . ." *Zablocki v. Redhail*, 434 U.S. 374, 402 n.4 (1978) (Powell, J. concurring). Moreover, the judge is accorded total and unbridled discretion since effective review is not possible, *see New York ex rel. Wayburn v. Schupf, supra.*[29]

Although the probation intake officers are required to follow established criteria in determining whether to adjust a case or pursue it through the courts, they make their recommendations whether to release or remand the juvenile based on "whether they feel a child may be a calculated risk if returned to the community." (Tr. 161). Thus, as the study undertaken by Professor Wilkins referred to in

29. The short span of pretrial detention makes effective review impossible. Detention is over before the appellate review can be obtained. In *New York ex rel. Wayburn v. Schupf*, and, in this case, motions to dismiss on grounds of mootness were denied because to hold otherwise would have meant insulating § 739 from constitutional challenge. Nonetheless, in reality no juvenile ordered into pretrial detention can test the validity of that adjudication while he is being held in custody pursuant thereto.

his trial testimony demonstrated, juveniles under such circumstances may have their liberty curtailed because they possess "characteristics that annoy" the parole officer or judge, or because they may be viewed as "uncooperative." (Tr. 317). It is clear that the judge decides on pretrial detention for a variety of reasons—as a means of protecting the community, as a policy of the judge to remand (Exhibit 6a, p.3), as an express punitive device (Exhibit 42, p. 11), or because of the serious nature of the charge. (Tr. 465, Exhibit 13a, p.3), among others.

Probation intake cannot undertake a thorough investigation of the youth. The probation officer learns what delinquency is charged. This may be only marginally helpful because as a general rule the original charge is considerably reduced or modified after a probable cause or fact finding hearing.[30] He evaluates the case on the facts presented by the police officer and the juvenile. He ascertains whether the juvenile has had any prior court contacts and the nature of those contacts. He is not equipped to make any sophisticated or in depth evaluation of the charges or the child, particularly in light of time constraints. If the family court guidelines require him to process the case through the court, he must recommend, on the limited information provided, whether the juvenile should be detained or paroled.

While the time of probation intake is limited, there is considerably more time available than the judge may allo-

30. Justice Stevens dissenting in *Baker v. McCollan*, 443 U.S. 137, 154 n.13 and accompanying text (1979), pointed to a study of the District of Columbia, Brosi, *A Cross-City Comparison of Felony Processing* (1979) which showed that 49% of those arrested are never tried at all, with all charges being dropped before trial, and another study, Kamisar, LaFave and Israel, *Modern Criminal Procedure* (1974) which states that nationally 40% of all adults arrested are released without charges being filed.

cate. The judge has no opportunity to interview the juvenile. Whatever he hears in opposing remand comes from counsel for the juvenile. If counsel is court appointed, and this is the typical case, he takes on responsibility for the proceedings only moments before convincing reasons must be presented to the court for not ordering pretrial detention. The judge has roughly 5 to 15 minutes to determine whether there is the likelihood that the juvenile would commit another crime before the return date if released.

At trial, plaintiff's expert, Professor Leslie Wilkins, stated that he would be surprised if recommendations based on intake interviews were better than chance and assessed the judge's subjective prognosis about the probability of future crime as only 4% better than chance—virtually wholly unpredictable. He testified that no method had yet been devised which could predict with any acceptable degree of accuracy that a juvenile shall commit a crime, particularly the commission of an offense in a short space of time, as the judge must do in making his § 739 decision.

A review of the literature supports Professor Wilkins' observations and shows that no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime.

As one of the leading scholars on the issue has put it:

> [t]he ability to predict which juveniles will engage in violent crime, either as adolescents or as adults, is very poor.
>
> The conclusion . . . that "there has been no successful attempt to identify, within . . . offender groups, a

> subclass whose members have a greater than even chance of engaging again in an assaultive act" is as true for juveniles as it is for adults. It holds regardless of how well trained the person making the prediction is—or how well programmed the computer—and how much information on the individual is provided.

J. Monahan, The Prediction of Violent Behavior in Juveniles, 10-11 (paper presented at National Symposium on the Serious Juvenile Offender in Minneapolis, Sept. 19-20, 1977) (emphasis deleted), quoted in Feld, Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions, 62 Minn. L.Rev. 515, 541-42 (1978).

Moreover, not only does it appear that one cannot predict dangerousness with an acceptable degree of accuracy, but, to the extent that dangerousness can be predicted at all, there is a substantial problem of overprediction, that is, to identify persons protentially dangerous who, if subsequently released, would engage in no further violent or even criminal behavior. If a true positive is a person, who is predicted to and in fact engages in such behavior, then a false positive would be someone predicted to be dangerous but who would not engage in violent or criminal behavior. Thus, overprediction can be expressed in terms of the ratio of false positives to true positives.

Monahan also found that

> violence is vastly overpredicted whether simple behaviorial indicators are used or sophisticated multivariate analyses are employed, and whether psychological tests are administered or thorough psychiatric examinations are performed.

J. Monahan, *supra*, quoted in Schlesinger, The Prediction of Dangerousness in Juveniles: A Replication, 24 Crime & Delinquency 40, 47 (1978).

The literature on the prediction of dangerousness, distinguishes two methods for anticipating future behavior: *clinical* prediction,[31] on the one hand, and statistical or

31. Clinical Prediction

In the face of the literature about clinical predictions, it would be impossible to be sanguine about relying on clinical methods. Feld, *supra* at 543, asserts that, "In view of the uncertainties and inconsistencies typically associated with social science research, the clear-cut superiority of actuarial methods over clinical methods is startling." Other researchers, Hermann Mannheim and Leslie Wilkins reported that their use of statistical prediction techniques proved to be twice as accurate as clinician's "intuitive" judgment. *See* Koerin, *supra* at 53, *and see* Tr. 314, and Wilkins, *passim*, Tr. 314-384. In light of the universal pessimism concerning the prospects of making accurate and discrete predictions of future criminal behavior using statistical methods, and the latter's recognized "clear-cut" superiority over clinical methods, the clinician must be disheartened.

Schlesinger, *supra*, noted the disparity between the general claim that prediction of violence was futile, on the one hand, and the claims of 9 studies, on the other, purporting to make such predictions of violent behavior in children. Employing 30 factors identified amongst the 9 studies, Schlesinger attempted to predict violent behavior in 122 children, based on their presentence evaluations from family court in California. He found a very low incidence of violent behavior among the juveniles—only 5.7%; no significant relationship among the predictor variables, clinician's recommendations and criterion behaviors; and no significant relationship between predictions of dangerousness and subsequent violent behavior.

Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers L. Rev. 1084, 1094-1101 (1976), reported on their study which followed up criminal defendants who had been found incompetent to stand trial in New York City. These defendants had been evaluated by psychiatrists to determine the defendant's dangerousness, although no definition of that term was provided. The difference in assaultive

(*footnote continued on next page*)

(footnote 31 continued)

behavior between those diagnosed as dangerous and those not so diagnosed was found not to be statistically significant. The authors concluded that the study presented clear and convincing evidence of the clinicians' inability to predict assaultive behavior. *Id.* at 1098-99. *See also* Dix, *Clinical Evaluation of the Dangerousness of "Normal" Criminal Defendants*, 66 Va. L. Rev. 523, 542-44 (1980) (reviewing Cocozza and Steadman study). Examination of leading studies is said to confirm the inadequacy of evidence of the accuracy of clinical assessments. *Id.* at 544.

Those studies that indicate that it may be possible to develop reliable clinical methods of prediction also indicate how unlikely it would be for the family court judge's evaluations to be reliable. In *The Clinical Prediction of Dangerousness*, 24 Crime And Delinquency 28 (1978), Cohen, Groth and Siegel reviewed the literature criticizing clinical predictions and discussed two newer studies (Kozol, Boucher and Garofalo studying male sexual offenders over a ten-year period, and Hodges studying dangerous offenders over a three-year period) and concluded that these studies show "considerable improvement over the statistical studies. . . . The two studies demonstrate, we believe, that a conclusion about our capability of predicting dangerousness is premature." *Id.* at 35.

In *The Diagnosis and Treatment of Dangerousness*, 18 Crime & Delinquency 371 (1972), Kozol, Boucher and Garofalo reported on a ten-year study of almost 600 convicted male offenders, most of whom had committed a sex crime, compounded in some cases by extreme violence. On the basis of the initial diagnosis, the authors concluded that more than half of the subject offenders were not dangerous. Of these, 8.6% of those who were released subsequently committed "serious assaultive crimes." After receiving treatment for an average period of 43 months, 82 additional patients were recommended for release. Of these, 6.1% subsequently committed serious assaultive crimes. Another 18 patients were released against the clinicians' advice after treatment for an average period of 30 months with a recidivism rate of 27.8%.

The Hodges study, reported in Cohen, et al, at 35, followed up on 447 dangerous offenders for three years, and found that of those recommended by the clinical staff for incarceration who were not incarcerated by the court, 81% subsequently committed another offense (not necessarily a violent crime). Of those committed to the treatment center but later released against staff recommendations, 71% committed a new crime, but of those committed and later released on

(footnote continued on next page)

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the staff's recommendations, only 37% were later arrested for a new crime.

These newer studies do not show that a family court judge could make reliable predictions. Rather, by highlighting what is required for a reliable clinical prediction to be made, they show why the judge could not be expected to make reliable evaluations along clinical lines. As a preliminary matter, each of these newer studies ranged over a population that was in some respect selected before the clinicians began their work. The offenders studied were a small portion of the total inmate population. Thus, it is unclear how well these results could be generalized to the situation of the family court. In particular, since, on actuarial grounds, the fact that these individuals studied had been convicted makes it more likely that they will be "dangerous." The same cannot be said of the juveniles who were detained, or who risk detention, before trial. Moreover, each of the studies involves an initial classification by the clinical staff on the basis of which a substantial number of offenders are recommended for release. (In the Kozol, et al study, *supra*, over half were so released.) Even this initial diagnosis is, in terms of its depth, detail and sophistication well beyond what could be hoped for in the family court setting. In Kozol, *supra*, the initial diagnosis "is based on clinical examinations, psychological tests, and a meticulous reconstruction of the life history [of the offender] elicited from multiple sources—the patient himself; his family, friends, neighbors, teachers, and employers; and court, correctional, and mental hospital records. . . ." 18 Crime & Delinquency at 383. Similarly, Cohen, et al, describe the norm for clinical predictions:

> In evaluating an offender, the clinician bases his or her prediction on an extended period of study, makes use of a variety of professional personnel, and consults diverse clinical, behavioral and social sources of data. Typically, this involves a minimum of a sixty-day period.

18 Crime & Delinquency at 30-31.

Finally, these studies are apparently open ended in their definition of recidivism. As was noted *ante*, there is a wide discrepancy between the violence that may be indicated in general and that may be indicated for the relevant period of pretrial detention. There is no basis for supposing that a family court judge could predict reliably the juveniles who could be dangerous within the pretrial period.

actuarial prediction,[32] on the other.

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32. STATISTICAL PREDICTION

In reporting on both the current developments in statistical prediction and their own study, Wenk, Robison and Smith stated "The present state of the art holds little promise for the development of a prediction instrument that would warrant implementation in actual preventive or correctional programs." *Can Violence Be Predicted?*, 18 Crime & Delinquency, 393, 401 (1972). While an expectation of increasing statistical sophistication might lead one to suppose that, in the fullness of time, a reliable predictive method could be achieved, there is no basis on which to suppose that the family court judge's evaluations could be expected to succeed where other attempts have failed.

For a number of reasons, the study reported in *Preventive Detention: An Empirical Analysis*, 6 Harv. Civ. Rights Civ. Lib. Rev. 289 (1971) ("Harvard study") is particularly telling. This study examined the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (July 29, 1970) ("preventive detention legislation"), which provides for the "preventive pretrial detention of arrested persons felt to pose a threat to the safety of the community." More specifically, under this law

> any defendant charged with a "dangerous" crime, with obstructing justice, or with a "violent" crime if certain conditions are met, may be held for pretrial detention hearing, at which a judicial officer is to determine whether any form of release can satisfactorily protect the community.

Id. at 303-04 (footnotes omitted). If the officer does not so conclude, he may order the defendant held for up to sixty days. In deciding which criminal defendants pose so great a danger to the community that they should be detained without bail, the statute charges the judicial officer to

> take into account such matters as [1] the nature and circumstances of the offense charged, [2] the weight of the evidence against such person, [3] his family ties, [4] employment, [5] financial resources, [6] character and mental conditions, [7] past conduct, [8] length of residence in the community, [9] record of convictions, and [10] any record of appearances at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.

Id. at 309. The statute does not assign a relative importance to those various factors.

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The Harvard study tested the reliability of two numerical dangerousness scales, each of which combines in one index the particular defendant's score on all the variables. The first scale (DS-1) was fashioned by assigning weights to the variables on the basis of a subjective assessment of their importance. The second scale (DS-2) "was constructed using a statistical technique, readjusting the weights of the variables on the basis of their actual correlations to recidivism in the sample." *Id.* at 310.

Each scale could be used by selecting a cut-off score, above which the individual would be detained. For DS-2, no cut-off point existed for which more recidivists than non-recidivists would be detained. Thus, over-prediction is a substantial problem. The lowest false positive to true positive ratio would be 1.5 to 1.0. To detain all true positives, 225 non-recidivists would be included along with the 41 recidivists. A point at which 63% of the recidivists would be retained would still represent a false positive to true positive ratio of 1.5 to 1. Much more startling are the results of the unsophisticated DS-1 scale. At its best, this scale would select correctly only about 30% of the time—that is, 7 false positives for every 3 true positives detained. To ensure that all recidivists were detained, in effect 8 nonrecidivists would have to be detained for every recidivist. Only by detaining fewer recidivists can this high degree of overprediction be avoided: When 40% of the recidivists were detained, the ratio was considerably reduced but was still high, a ratio of 2.88 to 1.

Neither of these sets of results actually measure what would happen in pretrial detention. First, the accurate and detained information used in the study is not normally available to the judicial officer in a § 739 proceeding. Second, the Harvard study's definition of recidivism is not limited in time but relates to arrests and convictions occurring perhaps months following initial arrest and release. An accurate measure of the effectiveness of pretrial detention must consider the number of persons who would have committed crimes during th detention period only, and under this measure, the 60% accuracy figure for DS-2 falls to about 15%, and the 30% figure for DS-1 falls to about 5%.

In addition to the substantial body of literature in agreement that no reliable statistical prediction has been devised, the Harvard study indicates why the family court judge's determinations would be unreliable. Even to the extent that a set of variables could be attributed to the judge's evaluation, they would not have been weighted in a manner to enhance statistical reliability, and thus, the expectable range of accuracy would be that of the DS-1 scale. Further, since the judge's assessments bear only on pretrial detention, the expectable range of accuracy would likely be very low. Finally, the difficulty with overprediction would be substantial.

> A clinical prediction entails a clinician reviewing whatever information is deemed relevant and making a predictive judgment on the basis of professional training and intuition. Clinical prediction requires an integration of available information about the individual in order to develop "some psychological hypothesis regarding the structure and dynamics of this particular individual."

Feld, *supra*, at 543 (quoting P. Meehl, Clinical Versus Statistical Prediction 4 (1954)). Clinical methods rely on the use of trained psychiatric or social science staff, attempting a "wide band procedure in which a broad range of information about the individual is gathered from sources such as interviews, social history and projective testing." Koerin, Violent Crimes, Prediction and Control, 24 Crime & Delinquency 49, 51 (1978). Fashioning the hypothesis about the particular individual is frequently said to be done in terms of diagnostic frame of reference—a scheme of important personal variables that figure in the individual's personality and some sense of the dynamics of the personality. *See e.g.* Kozol, Boucher and Garofalo, The Diagnosis and Treatment of Dangerousness, 18 Crime & Delinquency 371, 384-86 (1972).

Actuarial or statistical prediction, on the other hand

> entails the development of probability relationships between predictor variables, such as age and prior offenses, and the behavior to be predicted—violence. It requires an examination of the individual only to determine the presence of the predictor variables.

Feld, *supra* at 543. In statistical prediction, the individual is, in effect, classified in terms of the presence or absence of

the predictor variables. Given the classification, the frequencies of behaviors can be concluded for persons belonging to the same class. *Id.*

The family court judge's evaluation of a juvenile bears a superficial resemblance to both methods in the sense that it lacks the refinements of each. The judge's assessment could not properly be called a clinical prediction, unless it could be supposed that the judge's experience on the bench and his judgment of human nature substitutes for a clinician's training; his confrontation with the accused juvenile substitutes for a diagnostic interview and examination; and the juvenile's arrest record substitutes for a patient's history. Nor is the evaluation by the judge in any way comparable to a rigorous statistical prediction. In comparison to the large number of variables used in the studies of statistical prediction, apparently very little data is made available to the judge. And, what is presented is crude and unrefined. There is no guarantee that significant information is available to him, or, if it is there, that it is perspicuous. Finally, there is no use of follow up studies to refine and reformulate the statistical prediction method that, implicitly, the family court judge might be said to be using. Accordingly, he would continue to rely on useless or even incorrect data and assign incorrect weight to the various variables utilized.

The literature generally agrees that no reliable method of predicting dangerousness, whether clinical or actuarial in nature, exists at this time. It follows *a fortiori* that the family court judge's opinion, lacking the requirements of each sort of predictive method, is also unreliable. Further, even to the extent that the literature on each type of method

is sometimes optimistic about the prospect of developing a reliable clinical or statistical method, nothing can properly be inferred about the judge's evaluation of juveniles, since the indications of optimism reflect methodological improvements which are not utilized in the judge's determinations.

Thus, it is clear that juveniles who are subjected to § 739 detention have their freedom curtailed by judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates.

In *Jurek v. Texas*, 428 U.S. 262, 275-6 (1976), an attack on a Texas statute, requiring a jury at the sentencing proceedings following conviction for a capital offense to consider whether the evidence established beyond a reasonable doubt that the defendant would commit criminal acts of violence, that would constitute a continuing threat to society, was rejected in an opinion by Justices Stewart, Powell and Stevens. They said:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. . . . The task that a Texas jury must perform in answering the statutory question at issue is thus basically no different from the task performed countless times every day throughout the American system of criminal

> justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

(footnote citations omitted)

The attorney general argues to the same effect, but the views expressed by the Justices in *Jurek* and the argument of the attorney general that courts are constantly engaged in predicting future conduct afford no basis for validating of a § 739 determination.

Denial of bail because of a risk of non-appearance is usually made after a hearing which reveals that the defendant is in good health, has no roots in the community, no family ties, is not employed and owns no property, has possible access to financial resources and no recognized attachments which would assure his appearance at trial. A sentence is imposed after full investigation of the defendant's background. The Texas jury in *Jurek*, as in bail and sentencing cases, had all possible relevant information about the defendant, and it had heard evidence adduced at trial and found him guilty beyond a reasonable doubt of an offense for which the defendant could be sentenced to death.

The family court judge in making a § 739 decision knows nothing about the juvenile if he is a first time offender. The judge, of course, has the charges before him, but he also should know that the charges will surely be reduced at probable cause or fact finding. If the juvenile has had prior court contact, the judge knows that he has before him a recidivist, but at that point he does not know the extent of the juvenile's personal involvement, the extent to

which the charges have been inflated and whether probable cause will be found. He must operate on intuition and his personal predilections, the antithesis of reasoned action.

Arbitrary and capricious adjudications that may deprive a juvenile of his freedom because of a feeling that a probation officer and judge have that the juvenile will commit a crime if released—a feeling that is intuitive rather than reasoned—are fundamentally offensive to a concept of ordered liberty in a free society.

Moreover, even aside from the innate inability to support a § 739 order of pretrial detention as a rational or reasoned judgment, the record is replete with § 739 determinations that constitute arbitrary and capricious action in its crudest and rawest form. Whether the juvenile was a first offender with no prior conduct, whether the court was advised that the juvenile was an obedient son or was needed at home, whether probation intake recommended parole, the case histories in this record disclose that it was not unusual for the court to discount these considerations and order remand based on a 5 to 15 minute evaluation. *See e.g.*, transcript of proceedings in case file histories of Carlos Fargas, Johnny McArthur, Christopher Cox, Glen Maloney, Wade Forde, Francisco Ramos, Jerome Basnight, Jose Cruz.

What seems to be the most patently arbitrary action, however, occurs in those cases in which the juvenile is paroled to the custody of his parents or guardians after the incident, has been home on parole ranging in the case histories in this record from roughly 5 days to over a month prior to the § 739 hearing, and even though there is no

showing of any other infraction while on parole, the judge nonetheless orders remand purportedly because there is a risk that the juvenile will commit a new crime before he is tried on the instant offense. Whatever meager rationale may exist in other situations to warrant ordering the juvenile confined pursuant to a § 739 determination, remand is wholly unjustified and unsupportable in these circumstances, and if the determination could be tested on review, it would surely be set aside as a clear abuse of discretion.

The examples in this record are such as to indicate that a § 739 remand is not unusual even in such cases. For example Carlos Fargas was arrested on April 24, 1979, and paroled to the custody of his parents. His § 739 hearing occurred on June 6, some 43 days later. His mother was sick in the hospital. Nonetheless, he was ordered remanded. Similarly, Luis and Sammy Rosario were charged with involvement in a delinquent act which occurred on March 2, 1978. Both were on parole from March 2 to March 15 when their § 739 hearing took place. Both were remanded. Johnny McArthur was involved in delinquency on October 12, 1977. He was on parole from that date until his § 739 hearing on November 28, 1977. His mother spoke highly of Johnny, but he was remanded. Christopher Cox, Glen Maloney and Wade Forde, along with Clarence Smith and Alex Michael, were involved in an incident on October 13, 1976, and paroled to the custody of their parents. At the § 739 hearing on November 12, in response to a court inquiry, the police officer stated that the boys had not given him any trouble. Smith, who had private counsel, and Michael were paroled. Cox, Maloney and Forde, however,

were remanded. There is nothing in the record to indicate the reason for the difference in treatment. Cox who was 13 was remanded and Michael, who was 15, was paroled. Probation intake had recommended parole for all. None had had any prior record.

Francisco Ramos was charged with a delinquency on March 4, 1978, and was on parole from March 4 to his § 739 hearing on March 17. While this was his 9th arrest and he was on parole on other matters, he had been reporting regularly. Parole was recommended. He was remanded. Jerome Basnight was free on parole for 6 days after his delinquent act, from October 14, 1977, until October 20, 1977. At his § 739 hearing on the latter date, despite this being his first court contact, he was remanded. Jerome [sic: Jose] Cruz was on parole from March 7, 1977, until his § 739 hearing on March 25, 1977. This was his first court contact, but he was remanded.

Carl Harris and Michael Taylor were free on parole from March 5, 1977, to March 17, 1977; Tyrone Parson was free on parole from November 6, 1976, to December 1, 1976; Daniel Nelson was free on parole from April 19, 1977, to May 3, 1977; and Daniel Gregoire was free on parole from August 23, 1977, to September 20, 1977. Each was remanded. It is conceded that these juveniles had prior court contacts. In the case of Parsons, there had been 7 such contacts, and in the case of Gregoire, 6 such prior contacts, five of which had been dismissed. While evidence of prior delinquency may make remand seem less egregious than the other listed examples, arbitrary use of § 739 power is nonetheless clearly manifest when a juvenile comes to court

days, weeks or more than one month after the charged incident without any showing of any intervening criminal act and is nonetheless remanded because of the court's professed belief that he will commit a crime before the return date. Such determination under those circumstances is both irrational and unreasoned. A statutory scheme that permits an individual's freedom to be restricted pursuant to that kind of irrational behavior must be condemned under the due process clause. *See Kent v. United States, supra; Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

2. A juvenile subjected to pretrial detention has not as yet had a "judicial determination of probable cause which the Fourth Amendment requires as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Bell v. Wolfish*, 441 U.S. 520, 526 (1979). When a juvenile is arrested and held in custody he must be taken before a family court judge within 24 hours for a § 739 hearing. The judges may postpone the hearing for another 24 hours. No probable cause determination is made before the § 739 hearing. The juvenile at this stage is without counsel until he appears for the § 739 hearing. In some instances he is before the court on a delinquency petition filed on information and belief. That is, the charges in the petition are not verified by someone with direct knowledge of what took place. If ordered remanded, a fact finding hearing must occur 3-6 days thereafter. That hearing may be delayed for as long as 14 days after the § 739 hearing but in such a case a probable cause hearing must be held within 72 hours of the § 739 hearing. Accordingly a juvenile may be held in pretrial detention under a § 739 determination for as long as 5 days prior to

any proceedings being held, neutral or adversary, pursuant to which a judicial determination of probable cause is made.

The burdens of pretrial detention are substantial to impose on a presumptively innocent man, even when there is probable cause to believe he has committed a crime. *Baker v. McCollan*, 443 U.S. 137, 153, (1979) (Stevens, J., dissenting). To allow a state to impose these burdens on a juvenile before the state has taken the initial validating step of establishing its right to restrict the individual's liberty, in order to insure his presence at trial, would seem to be at war with accepted concepts of due process of law.

While not every disability inflicted during pretrial restraint amounts to punishment in the constitutional sense, *Bell v. Wolfish, supra*, 441 U.S. at 537, and there is clearly a distinction between punitive measures, imposition of which the constitution forbids prior to an adjudication of guilt and regulatory restraints that may be permissible, *id.*; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-167, 186 (1963), the Act at issue here licenses a judge of the family court, acting on an intuitive hunch that the juvenile is probably guilty, to treat an adolescent like a convict until his innocence is established. In a society riddled with violence and fearful of crime, this approach may seem appropriate. Whatever current social imperatives might lead us to wish to deal with the problem of juvenile delinquency on the above basis, the presumption of innocence is ingrained in the fabric of our fundamental law, and the prerogatives § 739 permit contravene guaranties and rights we have long considered fundamental. *See e.g., Ingraham v. Wright*. Pretrial adult detainees held because they could not meet the terms of bail have the presumption of inno-

cence even though there has been a probable cause determination. Such detention has been held to be regulatory, not punitive, *see Bell v. Wolfish*, but juveniles held in pretrial detention present a stronger case of innocence than the adult. There has been no probable cause determination as to them, and "under the Due Process Clause a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish, supra* at 535.

3. When a court pronounces the judgment that a youth must be incarcerated under § 739 because he or she is likely to commit additional crimes if released, the act of incarceration constitutes punishment which cannot constitutionally be imposed prior to an adjudication of guilt. Such a decision to incarcerate offends the due process clause of the 14th Amendment because it is imbued with what have long been recognized as the three essential attributes of punishment: it inflicts a deprivation of a constitutionally protected liberty or property interest; it is officially imposed rather than being the spontaneous act of an errant official, *see Hernandez v. Lattimore*, 612 F.2d 61, (2d Cir. 1979); and it stigmatizes the youthful detainee in a way that associates him with criminal behavior.

Whether a deprivation of liberty or property constitutes "punishment" has often turned on the criminal or noncriminal nature of the behavior for which it is imposed. *Compare Trop v. Dulles*, 356 U.S. 86 (1958) (loss of citizenship for desertion from armed forces held to be punishment) *with Perez v. Brownell*, 356 U.S. 44 (1958) (loss of citizenship for voting in foreign election held not to be punishment). *See also Lipke v. Lederer*, 259 U.S. 557

(1922); *United States v. LaFranca*, 282 U.S. 568 (1931). In the latter two cases the regulatory or penal character of a tax depended on its "involving the idea of punishment for infraction of the law." 282 U.S. at 572. Similarly, in *Kennedy v. Mendoza-Martinez, supra*, the automatic forfeiture of citizenship for draft evaders was held to constitute punishment.

However, "punishment" is not limited to deprivations based on having committed a specific, identifiable crime. It is sufficient if the person is stigmatized as disreputable in a manner closely analogous to the process that occurs upon a formal finding of criminal guilt. In *United States v. Lovett*, 328 U.S. 303 (1946), the termination of employment for government employees "found guilty of disloyalty" was characterized as punishment notwithstanding the absence of any specific law making disloyalty a crime. 328 U.S. at 316. A similar process of stigmatization occurs with juveniles who are incarcerated because of anticipated imminent criminal behavior notwithstanding the court's inability to predict or specify what crimes they will commit.

The sharp distinction between pretrial detention of juveniles § 739 and pretrial detention of adults for failure to meet bail is apparent when we consider the criteria traditionally used to distinguish punitive from regulatory impositions:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is

> already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned. . .

Kennedy v. Mendoza-Martinez, supra, 372 U.S. at 168-69; *also see Bell v. Wolfish, supra,* 441 U.S. at 537-538. Bail is set for adults for the specific purpose of assuring the defendant's appearance at trial, and as such it may not be "excessive." U.S. Const. 8th Amendment. Excessiveness is determined in relation to this specific purpose. A court may not impose higher bail than appears "reasonably necessary" to effectuate the justifying reason for the restraint. *Stack v. Boyle,* 342 U.S. 1 (1951).

In contrast to the rather specific delimited purpose for which bail is set, the purposes of § 739—to protect society from juveniles' criminal conduct—are not sufficiently distinguishable from those of the juvenile justice system as a whole to constitute an "alternative purpose." Moreover, even if they did constitute such, the inability of trial judges to predict which juveniles will commit crimes, *see* discussion *ante* pp. 69-86 *et seq.,* means that any given decision to detain cannot "rationally be connected" with the purpose behind it. Thirdly, the stigmatizing of juveniles as prospective or habitual criminals prior to trial is such a departure from basic principles of due process that it "appears excessive" even in relation to the goal of protecting society.

The state cannot escape the obviously punitive nature of detention under § 739 by labelling the statute "preventive" and "regulatory," since "even a clear legislative classification of a statute as 'non-penal' would not alter the

fundamental nature of a plainly penal statute." *Trop v. Dulles, supra,* 356 U.S. at 95. If incarceration under the statute were based exclusively on a founded suspicion that the juvenile had committed crimes, no one would doubt that this constituted punishment. To hold that it is not "punishment" when based on a vague suspicion that the juvenile may commit future crimes would render the applicability of the due process clause in inverse proportion to the arbitrariness of governmental decision-making. The absurdity of such a result is perhaps what inspired Chief Justice Warren to insist that a deprivation did not cease to be punitive because its professed goals were preventive:

> It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

United States v. Brown, 381 U.S. 437, 458 (1965). When detention is imposed solely on grounds which are tantamount to a stigma of criminality, this is "punishment" regardless of the label attached, and regardless of whether it is based on past or predicted future acts.

A statutory scheme which empowers the state to have juveniles incarcerated for as long as 5 days without the state having established a justification for their being held surely constitutes a punitive measure offensive to due process requirements.

Accordingly, I hold that placing a juvenile under disability of restraint pursuant to the arbitrary and subjective

evaluation of a judge before the state has been required to show that his being held, even for regulatory reasons, is punitive and in violation of due process.

For these reasons I find § 739(a)(ii), both on its face and as applied, contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

IT IS SO ORDERED.

Dated: New York, New York
April 17, 1981

/s/ ROBERT L. CARTER

ROBERT L. CARTER
U.S.D.J.

District Court Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

[TITLE OMITTED IN PRINTING.]

This action for *habeas corpus* and declaratory relief came on for trial before the Court, Honorable Robert L. Carter, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is Ordered and Adjudged:

1. The New York Family Court Act Section 739(a)(ii), is unconstitutional, both on its face and as applied, in that it contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

2. The application for writs of *habeas corpus* for members of the petitioner class in the custody of respondent is granted and all class members in custody pursuant to Family Court Act Section 739 (a)(ii) shall be released forthwith.

/s/ ROBERT L. CARTER
ROBERT L. CARTER, U.S.D.J.

Dated: New York, New York
May 29, 1981

JUDGMENT ENTERED 6/1/81

/s/ RAYMOND F. BURGHARDT
Clerk

District Court Memorandum to All Counsel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DATE: August 5, 1981

To : Counsel in U.S. ex rel Martin v. Strasburg 77 Civ 6176 (RLC)
FROM : ROBERT L. CARTER
Subject: *July 29 Letter of Judith A. Gordon, Asst. Attorney-General*

The above-mentioned letter raises two questions: (1) whether the habeas corpus entered in the above styled case on June 1, 1981 is in force and effect to require the release of juveniles detained by respondent Strasburg under New York Family Court Act Sec. 739(a)(ii) after that date; and (2) whether the writ reaches juveniles detained under the applied Family Court provision other than [by] Strasburg.

The answer to the first question is that a writ reaches all detained juveniles held under the relevant act until this proceeding is concluded or the judgment entered is reversed.

The answer to the second question is no.

R.L.C.

[Addressees omitted in printing.]

Opinions and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 526, 706—August Term, 1981

(Argued January 12, 1982 Decided September 20, 1982)

Docket Nos. 81-2175, 81-2193

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Petitioners-Appellees,

—v.—

PAUL STRASBURG, as Commissioner of the New York City Department of Juvenile Justice,

Respondent-Appellant,

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant

Before:

OAKES, NEWMAN and WINTER,

Circuit Judges.[†]

[†] Text of opinion includes corrections provided to counsel on January 1, 1983.—*Ed.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Carter, *Judge*), declaring New York Family Court Act § 739(a)(ii) unconstitutional.

Affirmed.

[Appearances omitted in printing.]

WINTER, *Circuit Judge:*

This appeal involves a constitutional challenge to a provision of the New York Family Court Act[1] authorizing preventive detention of accused juvenile delinquents. It was brought in the District Court as a habeas corpus class action against the defendant Paul Strasburg, Commissioner of the New York City Department of Juvenile Justice,

1. The New York Family Court Act has been codified at Book 29A, Part I, Judiciary—Court Acts (McKinney 1975 Supp. 1981). References to the Family Court Act will be cited as "FCA § ——." The preventive detention statute challenged in this action is FCA § 739(a), which provides:

> *§ 739. Release or detention after filing of petition and prior to order of disposition.*
>
> (a) After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:
>
> (i) there is a substantial probability that he will not appear in court on the return date; or
>
> (ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

under 28 U.S.C. § 2254, Robert Abrams, Attorney General of the State of New York, intervening as a defendant. Judge Carter certified the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in a pretrial detention . . .," under the challenged statute. A trial resulted in a record of documentary and testimonial evidence about the actual practice of the Family Court in utilizing preventive detention, including expert testimony by a Family Court Judge, statistical studies and a collection of representative case studies.

Judge Carter held the statute unconstitutional. 513 F. Supp. 691 (S.D.N.Y. 1981). He issued a judgment granting the writ to all juvenile detained under the challenged provisions at any time before conclusion of this action. Defendants appealed. We affirm on the grounds that the statutory scheme and practice under it violate the Due Process Clause of the Fourteenth Amendment in that the period of pre-trial detention is utilized principally to impose punishment before adjudication of the alleged criminal acts.

THE STATUTORY SCHEME SUMMARIZED

Since our decision rests on a belief that the Family Court Act does not accord procedural due process, it is important to understand the procedural structure of New York delinquency adjudications. Although these juvenile proceedings are somewhat different from adult criminal proceedings in both ends and means, their major procedural stages have analogues in the adult criminal justice process. A juvenile proceeding is initiated by a petition

for delinquency,[2] a step analogous to an indictment. The case then goes to fact-finding before a Family Court Judge, at which time the juvenile is either adjudicated a delinquent or the petition is dismissed.[3] The analogue in the criminal law is, of course, the trial and verdict. The final stage is a determination of the disposition by a Family Court Judge,[4] analogous in the criminal law to adult sentencing. We set out these analogues, not to argue that the constitutional limitations on juvenile courts are identical to those imposed on adult criminal tribunals, but solely to facilitate an understanding of the result we reach.

The statutory scheme can be summarized as follows. The challenged provision is Section 739(a)(ii). It authorizes detention of a juvenile after filing of a petition, but before fact-finding, when a Family Court Judge determines "there is a serious risk that [the juvenile] may before the return date do an act which if committed by an adult would constitute a crime." Juveniles detained under 739(a)(ii) are entitled to a probable cause hearing within three to

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2. FCA § 731 prescribes the function and content of a delinquency petition:

> 1. A proceeding to adjudicate a person a juvenile delinquent is originated by the filing of a petition, alleging:
>
> (a) the respondent did any act which, if done by an adult, would constitute a crime and specifying the act and the time and place of its commission;
>
> (b) the respondent was a person under sixteen years of age at the time of the alleged act; and
>
> (c) the respondent requires supervision, treatment, or confinement.

3. *See* FCA §§ 744, 752.

4. *See* FCA § 753.

six days and an expedited fact-finding hearing.[5] If delinquency is adjudicated at fact-finding, a probation investigation and, in the case of "designated felony acts,"[6] a

5. FCA § 747 mandates that, if the respondent is in detention, a fact-finding hearing shall commence, unless adjourned, not more than three days after the filing of the petition against the respondent unless the respondent is charged with an act which if committed by an adult would constitute a Class A, B or C felony, in which case the fact-finding hearing shall commence within fourteen days. FCA § 739(b) provides that the respondent may not be detained more than three days, barring waiver or adjournment, unless the court finds probable cause. However, under "special circumstances," a juvenile may be detained for as long as six days without a probable cause determination having been made.

6. A "designated felony act" is defined in FCA § 712(h) to include the following offenses:

> (h) "Designated felony act". An act which, if done by an adult, would be a crime (i) defined in section 125.27 (murder in the first degree); 125.25 (murder in the second degree); 135.25 (kidnapping in the first degree); or 150.20 (arson in the first degree) of the penal law committed by a person thirteen, fourteen or fifteen years of age; (ii) defined in section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); 130.35 (rape in the first degree); 130.50 (sodomy in the first degree); 130.70 (aggravated sexual abuse); 135.20 (kidnapping in the second degree), but only where the abduction involved the use or threat of use of deadly physical force; 150.15 (arson in the second degree); or 160.15 (robbery in the first degree) of the penal law committed by a person thirteen, fourteen, or fifteen years of age; (iii) defined in the penal law as an attempt to commit murder in the first or second degree or kidnapping in the first degree committed by a person thirteen, fourteen or fifteen years of age; (iv) defined in section 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); or subdivision two of section 160.10 (robbery in the second degree) of the penal law committed by a person fourteen or fifteen years of age; (v) defined in section 120.05 (assault in the second degree) or 160.10 (robbery in the second degree) of the penal law committed by a person fourteen or fifteen years of age but only where there has been a prior finding by a court that such person has previously committed

(footnote continued on next page)

diagnostic assessment[7] precede the dispositional hearing. The Family Court Judge can choose among several alternative dispositions, including suspension of judgment,[8] probation,[9] placement at home or with other individuals,[10] placement in a facility or school where treatment is available[11] or restrictive placement (incarceration).[12] The statutory criteria for determining the appropriate disposition emphasize the needs and best interests of the juvenile, the information provided by the probation investigation and diagnostic assessment, the character of the offense and the need for protection of the community.[13] Some alternatives, however, are foreclosed or available only on a limited basis. The Family Court Judge has no option to transfer the juvenile to an adult criminal tribunal. In addition, placement in a treatment facility turns upon the availability of space and the consent of the particular

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an act which, if committed by an adult, would be the crime of assault in the second degree, robbery in the second degree or any designated felony act specified in clause (i), (ii) or (iii) of this subdivision regardless of the age of such person at the time of the commission of the prior act; or (vi) other than a misdemeanor, committed by a person at least seven but less than sixteen years of age, but only where there has [sic] been two prior findings by the court that such person has committed a prior act which, if committed by an adult would be a felony.

7. *See* FCA § 750(3).

8. FCA § 755.

9. FCA § 757.

10. FCA § 756(a)(i)

11. FCA § 756(a)(ii), (iii).

12. FCA § 753-a.

13. *See generally* FCA §§ 711, 753-a(2).

facility.[14] Even though a Family Court Judge may determine that placement for treatment is the appropriate disposition, therefore, the actual options in a particular case may be limited to probation or incarceration.

The statutory scheme thus contains facial incongruities. Preventive detention is authorized solely upon a finding that a juvenile may do an act in the interim between the petition and fact-finding which would be a crime if done by an adult. The potential crimes are not limited to felonies or violent crimes but include every act which constitutes a crime under the New York Penal Law.[15] The statute itself

14. *See* note 30, *infra; Cf.* P. Prescott, *The Child Savers,* 197 (1981).

15. The term "crime" is defined in New York Penal Law § 10.00(6) as any felony or misdemeanor. Thus, offenses such as playing three-card monte can, and, as the record reveals, sometimes do trigger the sanction of 739(a)(ii). This is in contrast to the District of Columbia pretrial detention statute, D.C. Code 1973, § 23-1322, upheld in *United States v. Edwards,* 430 A.2d 1321 (D.C. App. 1981), under which a suspect may be detained for up to 60 days pending trial only if that suspect has been charged with the commission of a "dangerous crime" (*i.e.,* taking or attempting to take property from another by force or threat of force, unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein, arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, forcible rape, or unlawful sale or distribution of narcotics) or a "crime of violence" (*i.e.,* murder, forcible rape, carnal knowledge of a female under the age of 16, taking or attempting to take immoral, improper or indecent liberties with a child under the age of 16, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year). Moreover, the judicial officer ordering preventive detention must find a substantial probability that the suspect committed that offense prior to the imposition of pre-trial detention. *Id.* § 23-1322 (b)(2)(C).

offers no procedural safeguards and does not set out substantive criteria, other than the conclusory "serious risk" test, such as prior court contacts or lack of family supervision, to limit which accused juveniles may be detained.[16] At disposition, on the other hand, elaborate statutory provision is made for collecting diagnostic and other information, and specific criteria are established to guide the Family Court Judge.[17]

THE STATUTORY SCHEME IN PRACTICE

The incongruities of the statutory scheme yield a paradoxical result in practice. The parties have waged a battle of statistics regarding the actual disposition of cases involving juveniles detained under 739(a)(ii).[18] However,

16. The case histories in the record reveal instances of detention under 739(a)(ii) of first offenders.

17. *See* note, 7, *supra.*

18. The record contains statistical compilations utilized by the parties to dispute the number of 739(a)(ii) detainees released at or before disposition. These include a monograph prepared by the Vera Institute of Justice and Court Administration Reports for the years 1977 and 1979. None of the data, apart from the representative case histories, allow a precise comparison of detained juveniles restrictively placed and released at disposition. The Vera Study, based on New York City juveniles, lumps detentions under 739(a)(ii) with detentions under 739(a)(i), while the Court Administration Reports, based on statewide data, suffer from that same imprecision but also do not indicate how many restrictively placed juveniles were ever detained. The Vera Study, relied upon by petitioners, indicates that of the detained juveniles, 49% have their cases dismissed before trial, 21% are dismissed or released after trial, and only 30% are restrictively placed. The Vera Study also demonstrates that, although one-third of the delinquency petitions filed results in pre-trial detention, only 11% of all petitions results in restrictive placements. Since the detainees include those held under (i) as well as (ii), it is not conclusive for our purposes. The defendants, on the other hand, apply a factor derived from the Vera Study's sample of placed juveniles

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one critical fact has been established—the vast majority of juveniles detained under 739(a)(ii) either have their petitions dismissed before an adjudication of delinquency or are released after adjudication. Of the representative case studies submitted as evidence, for example, the defendants' version of events indicates that well over two-thirds of the juveniles held under 739(a)(ii) were released at or before the dispositional hearing.[19]

The result in practice is that the vast majority of juveniles considered sufficiently dangerous by the Family Court to justify pre-trial incarceration under 739(a)(ii) are in fact released by prosecutors or by the Family Court within

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who were not detainees to data reflecting total restrictive placements contained in the Court Administration Reports. From that, they estimate that slightly less than 50% of the juveniles detained under 739(a)(ii) are not placed at disposition. Neither position can be relied upon for total accuracy. The defendants' position, however, is the least reliable. It not only suffers from the overinclusiveness of both studies but also attempts to combine selected data from a study based on New York City with selected data from statewide statistics.

We find that the case studies and the Vera Study established that the great majority of detainees under 739(a)(ii) are released before or at disposition. Although the defendants have superior access to generalized statistics and at least an equal opportunity to present a countersample of case studies, they choose to rely solely upon the most vulnerable data in the record. Even that data, however, indicates that close to half of all (ii) detainees are quickly released.

19. The representativeness of the thirty-four case histories in the record is not challenged by the defendants. Adopting the defendants' version of these histories, final dispositions are known for thirty-two of the juveniles. The petition of delinquency and results of fact-finding of one juvenile were not offered for admission into evidence and the record of another juvenile reflects only that he was paroled pending receipt of certain investigation materials. The vast majority of that sample, twenty-three of the juveniles, or 70%, were released at or before disposition stage. Twelve of these cases resulted either in a dismissal, withdrawal or adjournment in contemplation of dismissal before fact-finding; the remaining eleven resulted in either probation or a suspended sentence.

days or weeks. Defendants attribute this peculiar result to the statutory incongruities described above. Detention decisions under 739(a)(ii) emphasize crime prevention and are made on the basis of limited information presented in summary fashion. Dispositional determinations, on the other hand, take the juvenile's welfare and potential for treatment into account and are based on more detailed and extensive information.

The defendants offered expert testimony by a Family Court Judge concerning the actual practice under the statutory scheme.[20] He testified that the detention hearing under 739(a)(ii) usually involves only the Family Court Judge, a prosecutor, a Court Liaison Officer, the juvenile, his or her attorney, and the parents or their representative.[21] It takes place soon after the arrest and a stenographic record is kept. In the typical case, the evidence before the Judge is limited to: (a) the petition for delinquency and an affidavit by a witness stating the petition is accurate; (b) a recommendation by the Court Liaison Officer to detain or release the juvenile based on inquiries and recommendations made by a probation officer who is usually not present; (c) statement by the juvenile or his or her attorney and by the parents or other persons accompanying the juvenile.[22]

The Family Court Judge testified that the criteria utilized in practice under 739(a)(ii) emphasize matters going solely to the protection of the community. These

20. Testimony of Judge Cesar Quinones, Transcript of Trial Proceedings, pp. 435-513; Joint App. at 521-99.

21. *Id.* at 477; Joint App. at 533.

22. *Id.* at 463; Joint App. at 549.

include prior record, recent court contacts, seriousness of the charge, and adequacy of supervision.[23] He emphasized that the criteria do not include the interests of the child and often result in confinement under circumstances harmful to the juvenile.[24] The same witness testified that the

23. *Id.* at 465-68; Joint App. at 551-54.

24. Judge Quinones testified about the purpose of 739(a)(ii) detention and emphasized that such detention may be harmful to the juvenile:

> Q. [by Ms. Gordon] Judge, what is your opinion of the purpose of the detention that Section 739(a)(2) [sic] authorizes?
> * * * *
>
> A. [by Judge Quinones] I believe that the purpose of 739(a) is really the protection of the community. I believe that's the basic purpose for that provision.
>
> Q. If that statute serves the interest of the child at all, in what sense does it serve the child's interest, if you have an opinion?
>
> A. If it serves the child's interest at all, it would be the minimal benefit that while he is in detention, he is not committing another crime; if that can be called a benefit to the youngster, but I don't believe that detention is actually for the benefit of the youngster, not under this statute.
>
> I certainly would not remand anybody for benefit. Perhaps you might find a rare case where somebody might be so favorably or so shockingly effected by a short stay in juvenile center that that might turn him around, but I don't believe that is the purpose he is put there, no. You don't put them in for their own good, I'm sorry.
>
> Q. Are there any disadvantages or bad effects from the detention or the pre-trial detention of a juvenile in your opinion?
>
> A. Yes.
>
> Q. What are they?
>
> A. In my opinion, all defenses [sic: detentions], juvenile or adult, can have bad effects. For one thing, we are talking about youngsters of tender age. You are taking them away from their family. I mean, that's bound to have a psychological . . . detrimental effect on them.

Id. at 479-80; Joint App. at 565-66.

factors taken into account at the dispositional hearing differ substantially from those utilized at the 739(a)(ii) hearing. At disposition, the best interests of the child are the principal concern and further detention is regarded as a "harsh solution."[25] Moreover, considerably more information about the child is before the Family Court Judge at the dispositional hearing than is available at the 739(a)(ii) hearing. Not only is the information more complete and up-to-date, but psychological assessments are also provided.[26]

Two other facts influence the lenient disposition of adjudicated delinquents. First, as the evidence of the

25. Judge Quinones testified about the standards in dispensing punishment at disposition, as follows:

> Q. [by Mr. Guggenheim] How can you account, Judge, for the fact in a case where the initial reaction of the court is to detain a child based on a prediction that he will commit another crime or crimes if not detained with an ultimate disposition in the case of probation?
>
> A. [by Judge Quinones] Probation indicates that there has been a finding in the case. You have to have a fact-finding otherwise probation wouldn't be discussed.
>
> Now, when it comes to the dispositional hearing, the main purpose of the dispositional hearing or the main thrust would be the best interest of the child. In a dispositional hearing you are supposed to keep the child's best interest at heart and I think that—well, speaking for myself, I think that any kind of detention at a dispositional hearing is a very harsh solution to the problem and you will look for the least harmful or to the most beneficial disposition at dispositional hearing keeping the best interest of the child in mind and many times that is probation.

Id. at 505-06; Joint App. at 591-92.

26. *Id.* at 506-07; Joint App. at 592-93.

defendants demonstrated[27] and as they emphasized at oral argument,[28] the time served, including the preventive detention period, is frequently considered sufficient punishment by the Family Court. Juveniles detained under 739(a)(ii) may be held in a secure facility and exposed to assault and criminal subcultures.[29] Family Court Judges who consider detention "harsh" in the first place and not

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27. On redirect examination, Judge Quinones added:

> Q. [by Ms. Gordon] At the dispositional hearing, Judge Quinones, do you take account of the fact that a child who has been previously remanded has already spent some time in a restrictive environment in coming to your disposition?
>
> A. [by Judge Quinones] Yes, that is taken into consideration also.

Id. at 507; Joint App. at 593.

28. At oral argument before this Court on January 12, 1982, counsel for the defendants argued:

> One of those decisions commonly made by a judge is that if a person has been detained, even in lieu of bail, that the person has done sufficient jail time, to use that term loosely. Accordingly, to say that a Family Court Judge who issues a disposition three months, six months later to a child who has been detained, may simply be a statement that the child has already done enough time.

Verbatim Transcript of Oral Argument, January 12, 1982, p. 21.

29. Judge Quinones noted in his discussion of the harmful effects of pre-trial detention the detriment accompanying detention in a secure facility:

> A. [by Judge Quinones] Then again, juvenile center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they possibly might be and it might have a bad effect in that respect.

Transcript of Trial Proceedings at 480; Joint App. at 566.

in the juvenile's interests, will understandably give great weight to prior confinement.

Second, as already noted, placement in a treatment facility, an intermediate disposition between probation and incarceration, is feasible only when a treatment facility has space and agrees to accept the child. In some cases, therefore, the Family Court Judge may face a choice between a disposition regarded as too lenient and another regarded as too harsh. The former may then be chosen as more likely to further the best interests of the child. The practical inability to provide placement in a treatment facility for criminally inclined juveniles has led to public expressions of frustration by Family Court Judges in response to criticisms of lenient dispositions.[30]

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30. Judge Edward J. McLaughlin, the Chairman of the Association of New York State Family Court Judges, stated recently:

> In adjudicating issues involving alleged delinquents, the Legislature provided that there be two trials. The first, known as a fact-finding hearing, would be conducted essentially under the due process rules of a criminal proceeding. If the facts were proven beyond a reasonable doubt, the court was obliged to conduct a second trial to determine whether the delinquent was in need of treatment and, further, whether treatment was available. It is the requirement regarding the availability of treatment that exposes the court to its greatest public criticism. The Legislature did not permit the judge to punish the delinquent. Neither is the judge allowed to compel any institution to accept the delinquent for treatment: the treatment facility determines whether help is available.
>
> This mandate led to the most glaring dissatisfaction with the court, since it is the delinquent most in need of help—the sickest, if you will—who is the least likely to be found eligible for treatment by any existing facility. The situation thus created resembles the case of a terminally ill patient who is not accepted into a hospital, not because he doesn't need treatment but because no treatment is available.

N.Y. Times, March 15, 1982, p. A16, col. 3.

Prosecutors take into account judicial attitudes in the juvenile analogue to plea bargaining, and the dismissal rate is accelerated in the anticipation that particular juveniles will be released even if adjudicated delinquent. The record indicates that a large percentage of juveniles detaind under 739(a)(ii) in fact have their petition dismissed before fact-finding. Of the case studies, the defendants' version indicates that over one-third were released under such circumstances.[31]

The net result of this combination of statutory language and conscious judicial practice thus is that by far the greater number of juveniles incarcerated under 739(a)(ii) will never be confined as a consequence of a disposition imposed after an adjudication of delinquency, the usual course of events being either a dismisal before adjudication or release upon a post-adjudication dispositional hearing.[32]

DISCUSSION

The presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt are important elements of Due Process itself, *In re Winship*, 397 U.S. 358 (1970), which would be gravely diminished in the protection they afford if individuals can be routinely incarcerated pending trial. Even the most persuasive

31. *See* note 20, *supra*.

32. Part of the detention period for some of these juveniles is between fact-finding and disposition and thus occurs after an adjudication of the alleged criminal acts. The testimony was that in the usual course of events, those juveniles detained under 739(a)(ii) will continue to be held once adjudicated while those not held in the pre-trial period will continue to be free pending disposition.

demonstration of innocence cannot prevent the deprivation of liberty if incarceration precedes, rather than follows, the adjudication of criminal liability.

The only exceptions presently recognized to this general rule appear to be brief detentions pending bail hearings, detention for failure to post bail subject to the Eighth Amendment's prohibition on "excessive" bail, or in limited classes of cases, denial or revocation of bail. *See generally* C. Whitebread, *Criminal Procedure* §§ 17.01-17.03 (1980).

The extent to which exceptions other than those relating to bail may be carved out is not clear. We believe all would agree, however, that any exception to the general rule that incarceration follow, rather than precede, adjudications of guilt can be justified, if at all, by a compelling governmental interest. *Cf. Gerstein v. Pugh*, 420 U.S. 103 (1975). The defendants argue, in the case of 739(a)(ii), that crime prevention is such an interest. That statute ostensibly responds to calls for preventive detention to protect the community from criminally inclined individuals. As conveived by its proponents, preventive detention is a method of confining inherently dangerous individuals accused of crimes pending trial and sentence of confinement. *See Note, Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1496-98 (1966). The underlying theory is not that propensity alone justifies confinement but that the expectation of an adjudication of guilt and subsequent sentence of confinement, along with a finding of propensity, justifies protecting the community from the individual in the interim period. Hruska, *Preventive Detention: The Constitution and the Congress*, 3 Creighton L. Rev. 36, 46

(1969). Such a scheme raises serious constitutional questions which the parties have asked us to address. We decline, however, to reach those issues because 739(a)(ii) is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts.

Crime prevention simply does not provide a justification for the detention of the vast majority of juveniles actually held under 739(a)(ii). Family Court Judges, we are told, release large numbers of detainees at disposition because much more information pertaining to the particular juvenile is available there than at the detention stage and because the Judges tend to find that the time already served is punishment enough. While the record is silent as to explanations for the similarly large number of prosecutorial dismissals before adjudication, it can be inferred that such cases as a class involve facts even less compelling as to guilt or appropriateness of further incarceration.

Accepting the defendants' view, the vast majority, in all likelihood over two-thirds, of the 739(a)(ii) detainees fall into one or more of the following categories: (1) those against whom the evidence of guilt is weak or insufficient; (2) those who are not so dangerous that they cannot be released after a short period of detention; and (3) those who are regarded as having served enough time in confinement. Crime prevention is not a sufficiently compelling governmental interest as to any of these detainees to justify shortcutting the fundamental procedural requirement that imprisonment follow, rather than precede, adjudication. Category (1) involves detainees ultimately released by prosecutorial dismissal or on a judicial finding of insufficient evidence. As to them, incarceration is

imposed but guilt is never adjudicated. Category (2) involves detainees about whom a mistaken judgment was made in the course of the summary hearing held under 739(a)(ii). As to them, no constitutional purpose justifies their detention. Category (3) involves adjudicated delinquents considered to have been punished enough by the time served. No compelling governmental interest justifies the imposition of sanctions on members of this group before, rather than after, adjudication. As to them, detention serves the purpose of punishment rather than crime prevention, since early release—within days or at most a few weeks—by a Family Court Judge contradicts any asserted need for pre-trial confinement to protect the community.[33]

In practice, therefore, the vast majority of the pre-trial detentions involve either mistakes in judgment fostered by 739(a)(ii)'s procedurally and substantively unlimited terms or the imposition of incarceration solely as punishment for unadjudicated crimes. To the degree that the goal of crime prevention is implicated at all in the actual operation of 739(a)(ii), it is only as to the minority, perhaps less than one-third, of the juveniles actually detained under its provisions. As to this group, moreover, only the risk that some might commit crimes is eliminated.

In re Winship, supra, directly ruled that an adjudication of delinquency which entails the possibility of institutional confinement must rest on proof beyond a reasonable doubt, because such confinement is constitutionally

33. The state defendants have not contended, and the record contains no evidence, that the period between arrest and disposition entails a greater risk of criminal acts by juveniles than the post-disposition period.

analogous to punishment for criminal acts. The provision invalidated in *Winship* under the Due Process Clause was in fact a provision of the New York Family Court Act which applied a preponderance of the evidence test in delinquency adjudications. The practice under 739(a)(ii) is, if anything, more offensive since confinement is imposed initially only upon a verified petition and later at best upon a finding of probable cause.[34] The Family Court Judge ordering detention is well aware that most detainees will either not go to fact-finding or, if they do, will be released on probation. Section 739(a)(ii) thus incarcerates—punishes—large numbers of persons upon a standard of proof which is constitutionally invalid and which cannot be justified in the name of crime prevention.

Section 739(a)(ii) thus has an unconstitutional impact as to the vast majority of the juveniles detained under it. We must now determine whether the statute is invalid as to all juveniles or whether individual detainees must litigate the particular circumstances of their confinement.

We hold 739(a)(ii) unconstitutional as to all juveniles. The preponderant number of persons affected by its terms suffer punishment without adjudication of guilt beyond a reasonable doubt and absent a compelling governmental interest. Individual litigation, however, is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined. Moreover, the record clearly demonstrates that the

34. Although in practice the Family Court requires a verified petition in 739(a)(ii) proceedings, the statute itself does not make likelihood of guilt a condition precedent to detention. A probable cause hearing, analogous in all relevant respects to an arraignment, is held within three to six days after a decision to detain.

unconstitutional impact of the statute results directly from its substantively and procedurally unlimited terms which cause Family Court Judges to incarcerate juveniles they know will be released before or at disposition. Whether we view the statutory scheme as commanding the results it in fact attains or as simply failing "to provide sufficiently clear guidance for police, prosecutors and the courts to enforce [it] in a manner . . . consistent with [the Due Process Clause]," *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974) *aff'd sub nom. Lefkowitz v. Newsome*, 420 U.S. 283 (1975), matters not, for under either view it violates constitutional guarantees.[35]

Our decision is strictly limited to the precise issue before us. We hold only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt. In such circumstances, the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard. We intimate no view as to the constitutionality of preventive detention in other circumstances.

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35. Our view conflicts with that of New York's Court of Appeals, which has upheld 739(a)(ii) against constitutional attack. *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518 (1976). Although the burden of the Court's opinion was directed to a claim that differential treatment of juveniles and adults violated the Equal Protection Clause, it recognized that preventive detention under 739(a)(ii) is imposed upon large numbers of juveniles who are in fact released after the dispositional hearing. This was attributed to the superior information available at that stage to inform the Family Court Judge as to the proper disposition. The Court held this constitutionally insignificant. We disagree for the reasons stated.

The sole remaining issue is the scope of the relief granted. Judge Carter allowed this habeas corpus action to proceed as a class action, certifying the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) . . . ." Appellants do not challenge this certification. His order, entered on June 1, 1981, provided that the writ be granted as to all members of that class, *i.e.*, those detained under 739(a)(ii) at any time before this action is concluded. Appellants challenge the order on the grounds that it grants *in futuro* release to individuals whose incarceration begins only after entry of judgment in the District Court. Class actions are permissible in habeas corpus proceedings, *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974), *cert. denied* 421 U.S. 921 (1975), and the writ is available to attack future confinement, *Peyton v. Rowe*, 391 U.S. 54 (1968). It is also clear, however, that the remedy of habeas corpus is directed to the unlawful custody of individuals, while prospective relief against enforcement of an invalid statute must be obtained in an action for an injunction under 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). The prospective effect of Judge Carter's order affects only those detained in custody while this action continues, not those who may be detained thereafter. We believe that the "in custody" language of 28 U.S.C. § 2254 does not require institution of repeated individual actions for each new detainee while an appeal from a judgment in a class action is being actively considered. The fact of potential custody is clearly present during the period of

litigation, and the defendants are always free to seek a stay of any such order from the appellate court. The order below thus does not significantly expand use of the writ.[36]

Affirmed.

NEWMAN, *Circuit Judge*, concurring:

I concur in affirming the judgment holding unconstitutional New York's preventive detention law for accused juvenile delinquents, N.Y. Family Court Act § 739(a)(ii) (McKinney 1975), but my reasoning differs from that set forth in Judge Winter's thoughtful opinion for the Court. All members of the panel are in agreement that, even if the Constitution permits preventive detention of those not yet found to have violated adult penal statutes or juvenile delinquency laws, this New York provision fails to comport with the requirements of the Due Process Clause of the Fourteenth Amendment. The majority concludes that section 739(a)(ii) denies liberty without due process because in the "vast majority" of instances where detention has been ordered either "mistakes in judgment" have been made concerning the finding of serious risk that the accused may commit a crime or the detention has been

36. This issue is apparently contested only because the state defendants believe that however unconstitutional 739(a)(ii) may be, injunctive relief is unavailable because the only feasible defendants are Family Court Judges who are immune from suit under § 1983. Brief of Intervenor-Appellant, p. 85, note, p. 86, note. Relief from 739(a)(ii) is, in their view, available only through successive individual habeas corpus actions. However, we fail to see why a custodial official holding a juvenile under the authority of 739(a)(ii) is not subject to a Section 1983 action.

imposed "solely as punishment for unadjudicated crimes"[1] Slip op. ——, *supra*. The "mistakes in judgment" are said to be fostered by the statute's "procedurally and substantively unlimited terms," that is, the statute's grant of limitless discretion to Family Court judges making the detention decision has in fact led to an unacceptable number of mistaken decisions. These instances of detention imposed for the purpose of punishment are found to conflict directly with the constitutional requirement that punishment be imposed only after adjudication of guilt. *See In re Winship*, 397 U.S. 358 (1970). I am less certain than the majority that the record supports a conclusion of a significant number of instances where detention was imposed either mistakenly or for purposes of punishment. Nevertheless, under traditional analysis of the requirements of the Due Process Clause, I am persuaded that New York's statute is unconstitutional because it permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion as to an issue of considerable uncertainty—likelihood of future criminal behavior. In short, the statute denies due process, in my judgment, not because it has been shown to yield an unacceptable number of mistaken or impermissible results,

1. It is arguable that, with respect to those accused of crime, pretrial detention imposed solely for the purpose of preventing the commission of future crimes prior to trial is punishment. With respect to those *convicted* of crime, the imposition of added confinement, beyond the penalties for the specific offense, is nonetheless punishment despite the prospective purpose of preventing future harm. *Specht v. Patterson*, 386 U.S. 605, 608-09 (1967). The extension of that principle to those *accused* of crimes raises the broad issue of whether pretrial detention to prevent future crime is ever permissible, an issue that need not be faced in deciding this case. For purposes of this appeal, I am willing to assume that pretrial detention ordered for the purpose of preventing future crime serves a regulatory purpose.

but simply because it needlessly creates an unacceptable risk of such results.

Traditional due process analysis requires consideration of three factors in determining the constitutional adequacy of procedures by which a governmental interest is advanced at the expense of an individual interest: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The private interest impaired by § 739(a)(ii) is personal liberty, obviously of fundamental importance. The power of arrest, subject to Fourth Amendment limitations, permits that interest to be impaired in advance of an adjudication of guilt, but not under procedures that fail to provide "sufficiently clear guidance for police, prosecutors, and the courts" so that the Fourth Amendment is observed. *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166, 1174 (2d Cir. 1974). The precise private interest at issue in this case is personal liberty after arrest and before trial under circumstances where a court has already determined that there does not exist a substantial probability of flight.[2]

The governmental interest is the prevention of future crimes, obviously of great significance in general, but of

2. The juvenile may be detained if "there is a substantial probability that he will not appear in court on the return date." N.Y. Family Court Act § 739(a)(i) (McKinney 1975).

high value in a particular case only to the extent that the pretrial detention of a person will prevent the commission of a crime that he would have committed if not detained, or will at least significantly reduce the risk of his committing such a crime. Of course, while detained the person will not commit an ordinary street crime against members of the public; the uncertainty in determining whether his pre-trial detention advances a governmental interest arises from the difficulty of predicting whether he would have committed a crime if not detained, or assessing at least the probability of his doing so. That difficulty requires consideration of the third due process factor, the risk of an erroneous deprivation and the probable value of safeguards.

The hazards of predicting human behavior are well known. They are not diminished when the issue is whether a person arrested for one crime will, in the interval prior to his trial, commit another crime. Presumably, the legislative judgment reflected in New York's statute rests primarily on the traditional rationale for preventive detention: a person who has committed a crime may have a propensity for committing crimes, and the likelihood that an arrested person has in fact committed a crime may be a sufficient basis for including him in the class of those who are likely to commit other crimes. Perhaps, in addition, the legislature believed that some persons accused of crime may expect that they will be convicted and may estimate that they are unlikely to receive enhanced punishment for a crime committed prior to sentencing on the initial charge. Under the stress of apprehending punishment, they may

mistakenly think they can with impunity commit a "free" crime.[3]

The spirited debate over preventive detention has focused primarily on whether the "propensity" rationale has sufficient validity to justify the risk of detaining some individuals after arrest who in fact would not have committed a crime if not detained prior to trial.[4] It is not necessary in this case to assess the ultimate issue whether the Constitution prohibits pretrial detention on the basis of uncertain predictions of future criminal behavior. *See Sellers v. United States*, 89 S. Ct. 36, 38 (1968) (Chambers' opinion of Black, J., questioning whether dangerousness is "ever" a justifiable ground for denying bail). The far narrower issue here is whether the risk of an erroneous prediction about future crime is high and whether safeguards not included in section 739(a)(ii) would be of value. To state the issue is to answer it. The proponents of preventive detention doubtless assess the risk of erroneous determinations somewhat lower than do

3. Since the challenged statute authorizes detention only on the basis of a prediction of commission of a future crime, it does not purport to rest on other rationales advanced in support of some juvenile detention statutes that concern protecting the juvenile from dangerous home conditions or assuring his availability for study or treatment. *See* Comment, *A Due Process Dilemma: Pretrial Detention in Juvenile Delinquency*, 11 John Marshall J. Prac. & Proc. 513 (1978); Note, *The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of "Crime,"* 18 Vand. L. Rev. 2096 (1965).

4. *Compare* Hruska, *Preventive Detention: The Constitution and the Congress*, 3 Creighton L. Rev. 36 (1969), and Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223 (1969), *with* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371 (1970), and Hickey, *Preventive Detention and the Crime of Being Dangerous*, 58 Geo. L.J. 287 (1969).

the opponents, but on the present state of knowledge concerning predictions of criminal behavior, only the foolhardy would deny that even with carefully circumscribed decision-making, a significant risk of erroneous prediction remains.

New York's statute does not include readily available limitations that would reduce the risk of error. First, the statute places no limits on the crimes for which the person subject to detention has been arrested. Even the most ardent advocates of preventive detention do not claim that commission of any crime, no matter how minor, provides an adequate basis for predicting commission of a future crime. Second, the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused. The statute authorizes pretrial detention without a finding of probable cause.[5] Third, the judge is not required to assess the individual's background; a juvenile with solid family support, no prior criminal record, and attending school or working is subject to preventive detention in the unfettered discretion of the Family Court judge, even when arrested for non-violent crimes. Fourth, the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released. Though a legislature has broad power to proscribe a variety of conduct as criminal, it does not neces-

5. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."). Even if some standard of proof less than probable cause would suffice to justify detention for the three to six days prior to the probable cause hearing mandated for all pretrial detainees, *see* N.Y. Family Court Act § 739(b) (McKinney 1975), New York's preventive detention statute contains no standard at all.

sarily have equivalent power to authorize pretrial detention because of the risk that the detained person might commit any of the acts, no matter how minor, for which criminal penalties have been established. Fifth, the statute does not specify any standard of proof by which the judge must be persuaded of a serious risk of future crime.[6] In marked contrast to the limitations in the well-known Distsrict of Columbia preventive detention statute upheld in *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981), the New York provision permits the judge to order detention of any juvenile accused of any crime whenever he determines that there is a "serious risk" of any future crime.[7] In my judgment, the Due Process Clause forbids the exercise of such unbridled discretion to inflict a deprivation as serious as loss of liberty in advance of trial on the basis of a highly uncertain prediction of future criminal behavior.[8]

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6. *Cf. Addington v. Texas*, 441 U.S. 418 (1979) (requiring standard of "clear and convincing" proof to justify civil commitment to a mental hospital); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (emphasizing importance of burden of proof when liberty of criminal defendant is at stake).

7. Even the Nebraska constitutional provision mandating preventive detention, which was declared unconstitutional by the Eighth Circuit for lack of individualized decision-making applied only to those accused of three serious crimes, treason, murder, and aggravated sexual offenses, and then only "where the proof is evident or the presumption great." Neb. Const. art. I, § 9; *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot per curiam*, 102 S. Ct. 1181 (1982).

8. The appellees' claim of a denial of liberty without procedural due process does not assert that the New York statute lacks such traditional procedural requirements as notice and hearing. Of the five deficiencies I have noted, only the absence of a specified burden of

(*footnote continued on next page*)

For these reasons I concur in the affirmance of the judgment of the District Court.

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proof concerns the type of procedural device normally comprehended within the requirements of procedural due process. Yet all of the deficiencies are procedural in the sense that they augment the risk of erroneous fact-finding, which is the risk sought to be reduced by the procedural component of due process. *Cf. Carlson v. Landon*, 342 U.S. 524, 543 (1952) (upholding the Attorney General's authority to deny bail to a narrowly described class of aliens, prior to deportation hearings, because "the Attorney General is not left with untrammeled discretion as to bail" and must "justify his refusal of bail by reference to the legislative scheme").

Notice of Appeal for Intervenor-Appellant

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 81-2175, 81-2193

[TITLE OMITTED IN PRINTING.]

PLEASE TAKE NOTICE that the Intervenor-Appellant, ROBERT ABRAMS, as Attorney General of the State of New York, hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(2) from a judgment of the United States Court of Appeals for the Second Circuit, entered on September 20, 1982, which affirmed a judgment of the United States District Court for the Southern District of New York declaring New York Family Court Act § 739(a)(ii) unconstitutional, and from each and every part thereof.

Dated: New York, New York
October 19, 1982

ROBERT ABRAMS
Attorney General of the
State of New York

• • •

Intervenor-Appellant, Pro Se

[Attorney's subscription and addressees omitted in printing.]

Notice of Appeal for Appellant

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 81-2175, 81-2193

[TITLE OMITTED IN PRINTING.]

Notice is hereby given that PAUL STRASBURG, the respondent above-named, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered in this action on September 20, 1982, which affirmed a judgment of the United States District Court for the Southern District of New York (Carter, J.), entered on June 1, 1981, declaring New York Family Court Act, section 739(a)(ii), unconstitutional.

This appeal is taken pursuant to 28 U.S.C. section 1254(2).

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Attorney for Respondent-Appellant

Office-Supreme Court, U.S.
FILED
AUG 1 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1248, 82-1278

IN THE

Supreme Court of the United States

October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

VOLUME II

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Trial Transcript

Testimony of Steven Hiltz
(Excerpts)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA, ex rel. GREGORY MARTIN, et al.,
Petitioners,

against

ROBERT K. DAVIS, Director of Detention Services,
Human Resources Administration,
Respondent.

[APPEARANCES OMITTED IN PRINTING.]

• • •

[19] STEVEN HILTZ, [called as a witness by Petitioners, was] duly sworn [and] testifie[d] as follows:

Direct Examination by Mr. Guggenheim:

Q. Good morning, Mr. Hiltz. Could you please indicate to the Court your profession?

A. I'm an attorney, licensed to practice in the State of New York.

Q. Have you ever appeared as an attorney in the Family Court of the State of New York?

A. Many, many times.

Q. In what capacity?

A. For eight and a half years I was employed with [20] the Legal Aid Society in the Juvenile Rights Division.

Q. Are you presently employed by that association?

A. No, I am not.

• • •

[24] Q. Focusing now on the intake process, did you have an occasion in your representation of juveniles in the Family Court to appear in the intake part?

A. Almost every day for eight years.

Q. Have you looked at Petitioners' Exhibits 1-A through 29-A?

A. Yes, I have.

Q. Would you describe them—how would you describe them in terms of your experience in Court?

A. I would say they are very typical as to what occurs at the intake stage.

Q. Who is in the courtroom? If you can set the personnel for us in the intake part in the Family Court?

A. There is the judge, there is a court stenographer taking minutes, there is a probation officer who serves the function as the court liaison officer, court clerk, court officers, the defendant, usually a relative with the defendant, an attorney assigned to represent the defendant, prosecutor, either with the City's Corporation Counsel or district attorney, depending upon the charge.

• • •

[25] A. [cont'd]. Also there is usually an arresting officer, sometimes an arresting officer.

• • •

[26] Q. Has the court liaison officer interviewed the juvenile in the typical case?

A. The court liaison officer does not interview the juvenile. Another member of the probation office would interview the juvenile, his parent, the arresting officer, possibly the complainant, write down a recommendation and then, as we say, send it up to the intake part to the liaison officer.

Q. Where does that interview take place and in what process, if you know?

A. It takes place before arraignment in the probation office in the Family Court building, usually the same day right before arraignment.

Q. Does that process have a special name?

[27] A. That process we call probation intake.

Q. So that there are two intake processes. One is probation intake at which the juvenile is interviewed by a member of the staff of the probation department?

A. Right.

Q. The other is the court intake?

A. That's the arraignment.

• • •

[28] Q. How are most petitions filed?

A. Most petitions are filed on the sworn statement on information and belief by the arresting officer or by another member of the police department and an affidavit by the complainant is attached.

Q. At the intake process is an inquiry held with respect to nonhearsay allegations of the truth of the charges?

A. Almost never.

Q. If that did take place, when would that take place?

A. If that did take place, that would be at a probable cause hearing stage within three days.

Q. Three days after what?

A. Three days after the arraignment.

Q. Now, have you also seen Petitioners' Exhibits 1-C, 2-C, and 3-C?

A. Yes.

Q. What are they?

A. Could I see them again? [Petitioners' Exhibits] 2-C and 3-C are endorsement sheets. They are pieces of paper attached to the petition in which the judge briefly describes who is present and what occurs on each individual court date.

Q. Is that the only record kept of the proceeding?

[29] A. No, there is an official record taken by the court stenographer.

• • •

[31] Q. Now, you say that you have represented clients who were held in pretrial detention, is that correct?

A. Yes.

Q. What effect, if any, did that pretrial detention have on a case?

A. Pretrial detention in reality changes the situation drastically. One of the main effects is that if someone is detained before trial, the trial must proceed within a 3 to 14 day period. You have a much shorter time for preparation. When you do go to trial, the judge is the sole trier of facts. There are no jurors in Family Court. The judge at trial is always aware that the juvenile is coming from detention and I would have to believe that the judge, not every

judge, but that many judges, by necessity, are prejudiced somehow by the fact that they know this person is coming from detention, that there is something in this person's background that led another judge to decide that he could not be released before trial. To me, it makes the trial a lot more difficult.

Q. When a juvenile comes into court from the detention facility, how is he brought?

A. He is brought in handcuffs by uniformed court [32] officers from a detention room up into the courtroom through—in Manhattan at least, through a separate entrance.

Q. Are there any other effects of the pretrial detention?

A. Well, probably the worst effect, as I said, aside from the fact if there is any prejudice on the judge's behalf, would be in the preparation itself. Obviously if he is detained, a client cannot come to your office to confer with you. The attorney would have travel up to Spofford in the evening and interview the client and aside from that, really probably the most damaging would be actually preparing for trial in terms of building a defense. I can give you a typical example of the case.

Most juveniles, when they are arrested are arrested at or near the scene of an alleged crime. Usually their defense is that although they were there, they did not take part in it. In order to prove this, a defense lawyer, of course, would want to know who you were with and what you were doing. Probably to win a case, to win a trial, you really have to show that your client was innocent. And the best way of doing that, usually, is to bring in witnesses for your client, the [33] people that he was with at the time.

These juveniles know their best friends by nicknames. You say to him, say who were you with, he says I was with Shorty or I was with Nicky. How could you find this person. Go to the playground. What playground? You could be talking with someone who is the defendant's best friend and I have learned he may be his best friend for years and he literally does not know his last name, he knows exactly where he lives but he does not know it by house number. You say where does he live, he says around 118 and 8th Avenue. What number? Well, it is the red building.

The Legal Aid Society has investigators in each office and based on that information we will try to find these people and it is almost impossible. If the respondent or the defendant is on parole, he can find his friend. I will send an investigator with him. He would go up to the neighborhood and there would be no difficulty in finding his friends for him and then I would have my investigator take a statement, try to get the potential witness to phone me or to come in to see me. If that's unsuccessful, I would try to persuade, as much as I can, to the client to bring in his friends, at the very least, for the day of trial and if they are reluctant, to get them to call me on the phone so I can [34] talk to them about what is involved. When the client is in Spofford and detained, it is almost impossible to find these possible witnesses.

• • •

The Court: Let me ask this question. Has there been any statistics done on this question to highlight the difference in terms of the conviction rate of those who are detained and those who are not? Are there any statistics on that?

The Witness: I don't know.
The Court: You don't know of any?
The Witness: No.

• • •

[35] Q. Are there any other effects on incarceration of which you are aware?

A. Well, the main effects are the manner of preparation, and the effect that if you go to trial you feel that you have at least one strike against you and the fact that the judge knows that someone else has determined that he has been locked up by another judge. Your Honor's point, in practice, as a practicing attorney, I would say when I had a client who came in from remand, my main consideration at that point was to get him paroled and I would say just as a matter of practice there would be many more confessions at that point if I felt he could be paroled after a confession, instead of risking going to trial.

The Court: You mean you are saying it is more likely to create plea bargaining?

The Witness: I would say I would be more likely to plea bargain, if I could get him paroled, to a lesser charge, if he came in from remand.

Q. How about with regard to the final sentencing in the case?

A. To the final sentencing, again, it has a very serious effect on the outcome. In Family Court it is called disposition. It is in effect sentencing. [36] Sentencing takes place if someone is in detention theoretically within 30 days.

The Juvenile Rights Division, while primarily a firm of attorneys who are defense attorneys, also has a quasi-social work function and has been federally funded by the government to have a social work unit. And on almost all of our clients who are on parole, pending the outcome of a trial and sentencing, we try to work with the child initially right at that stage and help with school problems, get him into a program so that at sentencing we can show the judge that this particular individual does not need to be sent away. If he is detained during this period, obviously that cannot be done and the situation will not have changed from the time he is arrested until sentencing except for the fact that he has been detained.

After a conviction, I think this—to get back to your question—after a conviction, another decision again is made as to parole or detention and the standards in the Family Court act are the same, the substantial probability that he may commit another crime or not come back. It has been my experience that once one judge makes a decision, another judge generally will just follow that decision at least until the time of [37] disposition. It is much more likely if someone is detained after a conviction he will continue to be detained until ultimate sentencing and it doesn't happen that often that he is detained before trial and there is a finding and he is released before sentencing.

Also on the other hand, almost always if he is on parole before a trial and he is convicted, most likely he will stay on parole before sentencing. I would say that would be the affect.

Q. What are the possible sentences in the court?

A. The sentences range, first, from outright dismissal on the grounds that no supervision or confinement is necessary.

Q. Could you explain that procedure?

A. Yes. It is hardly ever used. If, let's say, there is a conviction of a very minor charge, then there is a probation investigation and if at sentencing it is determined that this particular individual does not need any services of the court, the judge has the authority to dismiss the case.

Next up the ladder would be a suspended sentence. After that the juvenile at sentencing could be placed on probation for a period of, I believe, up to two years. And instead of probation the juvenile can be sent [38] away, can be placed in one of quite a few places. I would distinguish them between state run placements and places that are run by voluntary agencies and these are all places where he would live away from home and depending upon the place, some more secure than others.

• • •

[39] Q. Is any report furnish[ed] to the Court for the recommended sentence?

A. Yes, a report by the probation department which is called the investigation and report.

Q. When would that investigation and report be ordered?

A. That report is ordered after conviction.

Q. What does the probation department do in rendering its investigation and report?

A. It first reviews the juvenile's record, prior arrests, prior convictions, possibly contacts the school and gets a

report from the school. Interviews the family, interviews the youth. There would also be a psychiatric and psychological study, usually ordered by the Court and it would be up to probation to make sure that's completed and made part of the probation record.

• • •

[42] Q. When they come in to the Court from their home with their parent, where would they go?

A. They would first go to the probation officer [43] and be interviewed by that probation officer.

Q. That process is known as what?

A. Probation intake.

Q. In your experience, who appears in that interview?

A. It is the juvenile with his parent or relative, the police officer and possibly a complaining witness.

> The Court: They would all appear before the probation officer?
>
> The Witness: Theoretically, yes.

Q. In most cases does the complaining witness appear?

A. Well, the child is not entitled to an attorney at that point, so I do not sit in on those, but from my experience, the complaining witness usually does not come to court the first time and merely files an affidavit.

> The Court: Well, I thought we were talking about it going before the probation officer. You were talking about probation intake. The complaining witness appears before the probation officer?
>
> The Witness: Usually not, although sometimes they do.

• • •

[48] Q. If you had a preference for representing a client in the Family Court or the criminal court, which would you choose?

A. Well, at least in terms of an arraignment, almost always choose the criminal court.

Q. Why is that?

A. Well, in criminal court at arraignment, we are talking about the decision as to whether parole or remand and in criminal court there is only one standard and that is whether or not the person before the judge, the judge believes whether or not the person will come back to [49] court at the next court date. In Family Court, they get into many side issues, including, if the judge decides that a person should not be sent home, he has the option of saying this person may very likely commit another crime. In criminal court, of course, the judge cannot say that.

Also there is bail in criminal court where there is no bail provisions for Family Court.

• • •

Cross-examination by Ms. Gordon:

• • •

[52] Q. By the way, in the ordinary course, that 739 [53] hearing takes place the very next day after the child is taken into custody, isn't that right?

A. If he is still in custody, yes.

Q. So it takes place the next day. Is there an exception to that?

A. Yes. If the petition cannot be filed on time or if there is some other reason why it is not practical to have the child arraigned or have the 739 hearing, he must be brought before the Judge in 24 hours and the Judge can

hold him for an additional, can detain him for an additional 24 hours before that 739 hearing.

Q. So it is two days, two 24-hour periods?

A. Yes.

• • •

[55] Q. You described to the Judge in talking about the potential sentences, a procedure that probation goes through. Is that analogous to a pre-sentence report as we know it, for example, in the federal court?

A. It is analogous to it, yes. There is one major difference.

Q. You can tell us.

A. It is probably the heart of the Family Court. That a juvenile is given a right to a full dispositional [56] hearing, possibly testimony and cross-examination of witnesses which, to my understanding, is not as extensive in criminal court.

Q. Now, I would like to turn to the language of the statute that we have particularly in issue in this case and that is 739.

739 says in part • • • "Release or Detention after Filing of Petition and Prior to Order of Disposition."

Now, release, I take it, means—

A. Parole.

• • •

[57] Q. The other statutory term is detention. You said in your direct examination remand. Were you using those two terms synonymously, detention and remand?

A. Yes, I was. That's the term that the Court uses, usually it is "remand."

• • •

[58] Q. When did you leave your position with the Legal Aid Society?

A. June of 1979.

Q. When you left, was the Department of Juvenile Justice of the City of New York in being?

A. It was being formed.

• • •

[64] Q. • • • It is not necessarily true that a child has to come to a 739 hearing from a custody, is it? I mean a custody other than his parents? That 739 hearing can arise in the course of the proceedings after the filing of the petition and not necessarily immediately following, for example, an arrest?

A. It follows immediately after the filing of the petition.

Q. But the child doesn't necessarily have to be [65] previously detained?

A. No. He can be released by the police after the arrest and be given a date to come to court.

• • •

Redirect Examination by Mr. Guggenheim:

• • •

[68] Q. [By the Court] Do you see it [the probation recommendation for parole or remand] as the counsel for the child?

A. I hear it read to the Court.

Q. You hear it read?

A. Yes.

Q. But there may be some other matters on there that—the piece of paper or whatever it is, is not given to you?

A. Well, anything the Judge hears or sees, I, of course, have a right to hear or see.

• • •

[70] Q. • • • [D]o you know what a termination without adjustment is?

A. It is where a case is not filed for some other reason than the fact that the child cooperated with the Probation Department and agreed to their adjustment terms.

• • •

Testimony of Hubert Benjamin
(Excerpts)

[157] HUBERT BENJAMIN, [called as a witness by Petitioners, was] duly sworn [and] testified as follows:

Direct Examination by Mr. Guggenheim:

Q. Mr. Benjamin, by whom are you employed?

A. I am employed by the * * * New York City Department of Probation.

Q. What is your position there?

A. My position is supervising probation officers.

Q. How long have you had that position?

A. I have had the position since the year 1968.

Q. How long have you been a probation officer?

A. I have been a probation officer for 30 years.

Q. Where do you work?

A. I work in the Bronx Family Court, 900 Sheridan Avenue, Bronx, New York.

[158] Q. What is the principal function that you perfrom in your job?

A. I am the supervisor of probation officers working in the Intake Department of the Probation Service.

* * *

[159] Q. Focusing your attention on the time that the juvenile comes into the building and then is brought before a probation officer for an interview at the intake level, what takes place?

A. Well, there are many variables. A child may come in on a personal recog, they come in being escorted by a police officer. * * *

* * *

Q. Describe both situations, please.

A. If a youngster is brought in by the police officer, it may be that that youngster may be placed in a temporary detention facility if he is in their custody or handcuffed and the officer does not feel he should be freed at the time. Also a youngster may come in on a recog, that is when he is arrested, the police department feels that it is not necessary to detain him or place [him] or [her] in detention and they recog the child to a person they feel is capable of adequately supervising the child until the date they are to appear in court.

Now, if a child appears in court with the parent or guardian or whoever signed the recog, they are [160] asked to stay in a waiting room * * *. We have our clerks who register the case. Then it is assigned to a probation officer, intake officer.

Now, in order to proceed, for the intake officer to proceed, we have to wait for the complainant to appear. That is the one who signed the complaint or made the complaint to the police officer, provided it [the complainant] was not a police officer. Sometimes the police officers are the complainants. [The] case is assigned to the intake officer and if the complainant does appear, there is an interview with the complainant as to the charges as stipulated and then there is an interview with the child and his or her parents or guardian.

It is then after these interviews the probation officer then checks for prior records. The youngster may be involved in prior records in another borough or within the same building.

The officer then decides whether this case may be adjusted and the word "adjusted" means that it does not need the Court's intervention or whether it needs to go to court. If the intake officer decides that this case must go to court, he then refers the case for a petition to be drawn.

[161] The intake officer, must also, when he does that, make a recommendation as to whether this youngster may be paroled or remanded. This is a required function of the intake officer.

Q. Upon what basis is that decision made, that recommendation made?

A. The decision is based on law in general. That is, whether the intake officer feels that this child may be a calculated risk if returned to the community. That he may not return if allowed to go home and that he may be a danger to himself or others in the community if he were permitted to return to the community.

The Court: On what basis is that made? What basis are those kind of decisions made?

The Witness: It is based on the law of the Family Court Act, I believe—

The Court: I am not asking that. I don't believe that probation officers look to the [A]ct every time. They have to make the basis on some kind of decision of their own. How do they make such decision?

The Witness: The decision whether to remand or parole?

The Court: Yes. When a child is going to be a danger to himself or the community?

[162] The Witness: That comes from the gathering of facts during the interview.

The Court: What kind of facts are they?

The Witness: The nature of the case, the attitudes of the parties involved, the prior records.

The Court: Attitudes of what parties?

The Witness: The attitudes of the respondent child and/or parents or guardian, whoever is with them.

The Court: Parent and child. What else?

The Witness: The prior records. The nature of the prior records.

The Court: What else, if anything?

The Witness: Well, that's all I can think of at the present time. Of course, I would have to truthfully say that the nature of the current involvement would also be a consideration.

• • •

[164] The Court: Suppose the complaining witness does not want to appear, does not want to get involved, what happens?

The Witness: If the case is a designated felony, it must be referred for petition. Then it is up to the prosecutorial services to decide what happens to the case. That is the Corporation Counsel or the District Attorney's office.

• • •

[166] The Court: Suppose it is not a designated felon, then what happens?

The Witness: If the complainant does not show?

The Court: Yes.

The Witness: We will statistically mark that case terminated without adjustment.

The Court: And the child is released?

The Witness: Yes, sir.

The Court: I think I now have that clear. All right. I now want to know about what happens when the child is brought in—you said there was a difference when the child is brought in by the arresting officer and is detained, put in detention, I think you said that.

The Witness: Maybe. It depends. Usually at that time the child may be brought in in handcuffs.

The Court: I want to know the difference between when he is brought in and arrested, in handcuffs, or whatever, what's the difference in the procedure?

The Witness: Usually the difference in the procedure is that there is no parent or guardian available. The officers are instructed when they make the arrests that they must contact some person or some relative or adult friend to ascertain whether they will [167] appear in behalf of this particular child.

We have parents, guardians who say they do not wish to come in and place the youngster, they don't want to have anything to do with the child, do whatever you want with the child. So, in many instances, when the officer appears in court and he does not have any parent or adult or relative with this child, we, as a general practice and depends perhaps, not perhaps, on the allegation, will then interview the child, and I might add that we first advise them of their rights. They may or may not answer any questions. That's up to them.

Then we petition the court and that depends upon the nature of the allegations and the current charge to consider a temporary detention of not more than 72 hours and not less than 24 hours, contemplating that a petition may be drawn. May I add?

If we are aware that a petition will not be drawn, the complainant says, "Well, I was responsible for the taking into custody of this youngster but I do not wish to go forward," then we cannot, even though a parent does not appear or no one appears with the child, we cannot ask for his detention. We must release him because we have no case.

The Court: All right.

• • •

[169] Q. Mr. Benjamin, there has been testimony already in this case that many petitions are filed on information and belief in the Family Court. Is that right, to your knowledge?

A. I didn't hear the testimony and to my knowledge it is no longer correct. It is no longer a general situation, to my knowledge.

Q. What I mean by the question is that in many cases the complainant doesn't actually sign the petition based on personal—by coming into court but rather a police officer would sign it on behalf of a complainant?

A. I understand what you meant, sir. I repeat, that no longer is the general condition, as far as I know. It used to be. The Corporation Counsel is now insisting that there be a complainant and that where the police liaison officer, as you described, were signing petitions on behalf of the

police or whatever, that is no longer a general situation, as I know it.

Q. Does that happen at all?

A. I say it is no longer a general condition which infers that it may happen.

Q. The answer would be yes?

A. Yes.

[170] Q. When it does happen, did the complainant come to the interview?

A. No.

Q. So that petitions are filed in court even without the complainant appearing at the probation interview, is that correct?

A. Yes. May I just add something. You mentioned it and since you brought it to the Court's attention, that regards the police excusal program. You may have a complainant signing a deposition which sometimes precludes their having to appear for the interview with the probation department.

Q. That deposition would be signed at the police station?

A. That's correct.

Q. So then they don't come to court for the intake part at all?

A. They are supposed to be there but if they don't we can still proceed without their physical presence.

Q. What are the job qualifications for a probation officer?

A. The initial qualifications are a Master's degree in social work or sociology and/or related fields. [171] Should the probation officer not have a Master's degree, he

may have a Bachelor's degree in sociology or related fields and two years' paid experience in social work for related fields.

Q. Are there many probation officers who are on staff in the City of New York to your knowledge who do not have a Master's degree?

A. Yes.

The Court: Well, as I understand it, if you have a Master's degree, you don't need experience, but if you have a Bachelor's degree, you need to have several years' experience?

The Witness: Yes, sir, paid experience.

• • •

[171] *Cross-examination [by Ms. Miller]:*

• • •

[173] Q. And is it also true that you are required to advise both the complaining witness and the juvenile • • • that they are not compelled to have a preliminary conference with probation?

A. That's quite true.

The Court: They are not compelled to have a preliminary conference?

The Witness: That's right. I stated that they are advised of their rights and their rights are that they do not have to participate in the adjustment procedures.

Q. This is a voluntary procedure, is that correct?

A. That's correct. It is entirely voluntary.

• • •

[178] Q. * * * When you are making a recommendation [to the court], you can recommend parole to the parent or a responsible adult, parole to alternative detention or remand?

A. Correct.

Q. Those are your three options?

A. Yes.

Q. Is it the purpose of remand to alternative detention to keep the child at home but give him a more structured environment?

A. Yes.

* * *

[179] The Court: What is this alternative? Is that to a detention center, is that what that means, Mr. Benjamin?

The Witness: It is an alternative detention. This child, rather, is a risk to be returned to the community but if he were adequately and properly supervised, he could be returned to the community and [180] this is an alternative detention. It is an 8:00 to 5:00 activity if the child is involved in school and recreational activities and it is supervised. In fact, he may also stay there until 10:00.

The Court: Stay there until when?

The Witness: Until 10:00, because there is an evening program from 7:00 to 10:00.

The Court: What happens when he goes—

The Witness: He is fed there too, or she.

The Court: He goes there and after eight hours, what happens? He goes home?

The Witness: Yes.

The Court: He has to report to this place?

The Witness: Every school day.

The Court: It seems it would be like a halfway house or something like that?

The Witness: Yes, I would say so, yes.

• • •

[181] Q. Is there an educational facility at the day center?

A. Yes, there is. Licensed teachers and counseling and recreation facilities.

Q. Under the Board of Education supervision, is that correct?

A. Yes.

Q. Alternative to detention is strictly an interim form of referral, is it not? In other words, a child can be paroled to alternative detention together with his family but only until the time of fact finding, is that correct?

A. Yes. I would say substantially

Q. It is not a recourse at disposition?

A. No, no, it is not.

• • •

[182] The Court: What are you showing him now?

Ms. Miller: [Petitioners'] Exhibit 1-C.

The Court: What's the question?

Q. Mr. Benjamin, on these endorsements, the judge frequently after the fact-finding hearing indicates an I and R is ordered. Could you tell me what that is, please?

A. Yes, I believe I can. It is an instruction to the probation department to do an investigation and make a report with a recommendation on the adjourned date.

• • •

[183] Q. Mr. Benjamin, what is the investigation report, would you tell the Court, please?

• • •

A. As I stated, the judge orders an I and R as you say, that means an investigation to be done and a report to be made by the probation department on the adjourned date. The probation officer then gathers facts [184] through interviews and research and what have you on this particular situation. That is, he has the benefit of our probation intake records. He gathers his facts from the community, made from witnesses from the schools, prior records from other bureaus, if that be the case, and from that the probation officer then gets to the recommendation after consultation with his supervisor who must sign that report. It is then submitted to the judge.

• • •

Q. There is an additional order that appears frequently on this endorsement sheet which is an order for BMHS. Could you identify that for me? Is that an order to probation?

A. No, it is not to probation. It is to the Bureau of Mental Health Services. That is an order for the Bureau of Mental Health Services to perform either an emergency diagnostic report or a regular psychiatric report which includes a psychological and a psychiatric report.

• • •

[185] The Court: You don't have a psychological profile to deal with in terms of the intake probation interview. That's not a base for your recommendation for parole, remand or recommendation as an alternative to detention. You have no psychological profile?

The Witness: No, sir.

Ms. Miller: Could I ask one question?

Q. Isn't it possible, though, Mr. Benjamin, if it appears to the probation officer that the child has a problem at the intake interview he can order an emergency Bureau of Mental Health Services study before a petition is drawn and before the child is taken to court?

A. That's correct.

The Court: But what I am talking about is the exceptional circumstance. As a general rule, you don't go to any psychiatric or psychological analysis on the basis of your recommendation, is that correct?

The Witness: No, sir. If I may, I heard you state you only like to answer questions directly, but if I may, we did have such a procedure but no longer.

• • •

[186] *Redirect Examination by Mr. Guggenheim:*

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[188] The Court: Based on your own experience in terms of these intake interviews, what would be your estimate of the amount of time you take in terms of these intake interviews? How much time does it take, just roughly?

The Witness: It is an individual thing. I instruct my staff to—

The Court: I am talking about you. I'm not talking about—

The Witness: I apply it to myself. 45 minutes, I would need for an interview. There may be times —there are times in some cases where you have to spend a few hours and some 45 minutes and some less than [189] 45 minutes. But to do a fairly good job with the pressures that you have in intake, 45 minutes should be an appropriate amount of time.

The Court: That includes interviewing the complainant—

The Witness: All parties.

• • •

Testimony of Michael Bigley
(Excerpts)

[190] MICHAEL BIGLEY, [called as a witness by the State, was] duly sworn [and] testified as follows:

Direct Examination by Ms. Gordon:

Q. Mr. Bigley, by whom are you employed?

A. I am employed by the New York Division for Youth.

Q. What is your present position with the division?

A. I am director of the Detention Services Section.

Q. How long have you been the director of detention services?

A. Just over a year.

Q. What did you do prior to that?

A. Prior to that I was a Detention Services Section consultant which is a staff position in the same department.

Q. For approximately how long were you a staff consultant?

A. Approximately two and a half years.

Q. Did you hold any other positions or do any other work for DFY?

A. The year before I became a consultant I worked [191] on the detention services study unit which did a statewide study of detention and the year before that I was a program coordinator for the Division for Youth rehabilitation facility for the Hudson Training School.

Q. The study you mentioned, did it actually come out in a written report?

A. Yes, it is a study titled "Detention Services Policies and Practice, 1977".

Q. Just briefly, what kind of work did you do before you came to DFY or before you went to Hudson?

A. Prior to coming to the Division for Youth, I worked in New Jersey as a residential treatment task force program specialist with a psychological specialty. I worked in a diagnostic center in Pennsylvania, juvenile justice related diagnostic center in Pennsylvania. I was a youth division counselor in a YDC [Youth Development Center] for four years, two of which were part-time while I was in graduate school. And while I was in graduate school, I worked as a case worker in a child welfare agency and as a therapist in a child psychiatric center.

• • •

[192] Q. What degree, if any, do you hold?

A. I have a bachelor of science degree in psychology and a Master's of social services from Bryn Mawr College.

Q. Are the social [services] the same as social work?

A. Yes.

The Court: Where did you get your bachelor's degree?

The Witness: Penn State.

• • •

Q. Are you a member of any professional associations?

A. I am a member of the National Association of Social Workers, Academy of Certified Social Workers. I am a New York State Certified Social Worker and a member of the National Juvenile Detention Association.

Q. Have you had occasion to lecture to your professional associates regarding the detention of juveniles?

A. Yes. Several times in the past few years I have spoken, for example, with the National Youth Work [193]

Alliance. I have spoken to the Child Care Workers Association. I have done a variety of in-service training including the juvenile aid officers in New York State and I will be, at the end of this month, speaking to a LEAA sponsored symposium on children in jails.

Q. What is the subject of your upcoming talk?

A. Alternatives to jail placement.

> The Court: What's the total amount of years—well, I will include, I think, it was two years while you were in graduate school. What's the total amount of time you have spent in this field? It seems to me your whole work career experience has been in some relationship to the area? How long has that been?
>
> The Witness: I started in the YDC's [Youth Development Centers] in the summers between my junior and senior years in college in 1968.
>
> The Court: You have been working at it more or less ever since?
>
> The Witness: Yes, sir, it has been my only job area.

Q. With respect to your upcoming talk about alternatives to jail placement, I take it is alternatives to jail type placements for juveniles that you will be speaking about?

[194] A. Yes, it is. We have produced this handbook which describes New York State's alternatives to secure detention and it is that handbook that has piqued the interest of the people who are running the conference and caused me to be invited.

• • •

Q. Now turning your attention to your capacity as director of detention services. What is the difference, if there is any, between detention and long term care as those terms are used by DFY in their regulations and literature?

A. Detention for us is specifically the short term care between the time a child is taken into custody either by arrest or through the court, through the fact [195] finding, through the investigation stage, through the dispositional stage and pending the placement that is ordered at the dispositional hearing. Longer term care starts at that point. It is the care ordered at the dispositional hearing.

• • •

Q. What is your jurisdiction as the director of detention services over detention or short term care facilities in the state?

A. We are, for the most part, the regulatory and certifying agency for locally operated detention facilities. The single exception to that is the small 14 bed secure facility at Highland which we operate directly as a demonstration project. We do visiting, inspecting, monitoring of facilities, of population, technical assistance, program development with the agencies responsible for administering detention locally.

Q. Is it part of this obligation to certify or license every single detention within the parameters of the term as you have described it, every single detention [196] agency in the state?

A. Yes, it is. We issue operating certificates on an annual basis.

The Court: Am I to understand from that, Mr. Bigley, that institutions that have been described

previously as secure detention are not really state agencies, they are merely licensed by the program?

The Witness: Yes. In New York City Spofford has been operated for years by the Human Resources Administration or agency, HRA, special services for children and only in July of this past year did it come under the jurisdiction of the Department of Juvenile Justice which was created at that time. • • •

• • •

The Court: Let me get something else clear [197] since you have mentioned this. Are these agencies public institutions, that is, are they operated by local political units, for example, the city or private agencies or by both?

The Witness: The secures are largely operated by the public agencies, county, pieces of counties, government or city government. The nonsecures, some are operated by local governmental agencies and some are operated by private agencies.

The Court: I understand.

Q. In addition to your certification and inspection functions, does state DFY have any funding relationship to these detention facilities?

A. Yes. The Division for Youth reimburses the local government 50 percent of their costs for a detention operation.

• • •

[201] Q. What is the detention capacity of New York State, if you know?

A. The capacity changes almost daily because of the opening and closing of some of the small nonsecure facilities, foster home bed space changes. It is approximately 900 to 950 beds at any given time.

Q. Approximately or exactly, if you know, how much of that capacity is secure beds?

A. 395 secure beds in institutional facilities. There are additional * * * beds in 48-hour holdover facilities in remote parts of the state.

Q. In the holdover facilities, are those nonsecure or secure beds?

A. Those are secure. They are maximum three beds and maximum 48 hour length of stay. They are used to avoid middle of the night, long term transportation problems. There is one on the Canadian border, one in Erie, Pennsylvania and one in Niagara Falls.

Q. How many beds are there?

A. Secure?

Q. Yes.

[202] A. Just those nine.

Q. And the balance of some 550 are nonsecure beds?

A. Yes, it does.

Q. Spofford is a secure facility, is that right?

A. Yes.

Q. What is the bed capacity at Spofford?

A. The certified capacity is 212.

Q. Is it generally fully utilized?

The Court: I see Mr. Bigley was very careful in that answer and the next one will answer that.

Q. Is there a full utilization of those 212 beds in Spofford?

A. No, the population at Spofford in the last several months has been varying between approximately 160 and 190, let's say, running probably close to 180 in the last couple of weeks.

Q. Approximately how many nonsecure beds are there in New York City?

A. There are 56 certified nonsecure beds in the city.

Q. Does New York City hold any PINS [persons in need of supervision] children in nonsecure beds?

A. Not in certified detention facilities at this time. The Department of Juvenile Justice which operates [203] detention facilities has, as part of its enacting resolution, jurisdiction over JOs [juvenile offenders], juvenile delinquents and runaways and not status offender PINS kids. They [PINS] are going to the Human Resources Administration, special services for children, into temporary shelters and other kinds of emergency care.

Q. In other parts of the state where DJJ does not operate, obviously, are PINS children held in nonsecure detention?

A. Yes, they are.

• • •

[204] Q. Do you know what the average length of stay in secure detention for juvenile offenders and juvenile delinquents is on a statewide basis, currently?

A. I have those figures here. The juvenile offender population has a longer length of stay because of the time it takes to go through the various processes in the adult court

system. They have the arraignments and Grand Jury indictments. But for children who are juvenile offenders, the average length of stay is 24.3 days.

Q. Is that in secure?

A. Yes.

Q. How many [days for] juvenile delinquents in secure detention?

A. 12.2 days.

• • •

[205] Q. With respect to nonsecure detention, would you tell us what the average length of stay is for JOs and JDs in nonsecure detention?

A. The average length of stay for juvenile offenders in nonsecure is technically 38.5 but the numbers are almost meaningless because we are talking about a very few number of JOs being held nonsecurely. One JO stayed 132 days and that mixed up the rest of the numbers considerably. The delinquent petitions in nonsecure detention had an average stay of 21.9 days.

Q. What period of time do these numbers you are giving us refer to, '78, '79?

A. This is all for calendar year 1979.

[206] Q. Do you have any information available to you or statistics available to you on the number of juvenile delinquent arrests versus the number of juveniles detained after arrests?

A. The best numbers that we have on that are 1978 statistics.

Q. Do you have the 1978 statistic for the number of JDs and JOs arrested?

A. The number of JDs and JOs arrested in 1978 in New York [State] from DCJ[S] [Division of Criminal Justice Services] was reported to us as 93,184.

Q. Do you have the number of initial admissions of JOs and JDs to secure detention for 1978?

A. Yes, I do. 7,362.

Q. Have you calculated a percentage of these initial secure admissions of JOs and JDs against arrests?

A. It is approximately 7.9 percent.

• • •

[207] Q. Do you have any information that shows what percentage of initial secure JO or JD admissions stay in secure detention three days or more?

A. Approximately 50 percent. The 2500 of the 5400 admissions are released in three days or less. So approximately 50 percent. That would be just the JD population.

Q. What is the rate with respect to JOs?

A. The JOs it is approximately 700 or 1200 are released in three days or less.

Q. If you—what is the result with the 7.9 percent if you use the 3-day figure?

A. It would be decreased by 50 percent so it would be approximately 4 percent or less.

• • •

[209] Q. Since I am looking for the security aspect, Mr. Bigley, I would just like you to tell us what does—what is the definition of secure detention in New York State? What does secure mean?

A. Secure detention is detention in a facility characterized by restricting construction, hardware and procedures for the short term duration that I spoke of earlier.

Q. Is that definition of secure detention consistent with your understanding of the use of the term by other states?

A. Yes, it is.

Q. Is there any standard promulgated by any association, professional association, with regard to the number of secure detention[s] of arrest[ed] * * * juveniles that [210] the association publishing it feels is an appropriate level of secure detention?

A. Yes, there is. The national standard that has been thrown out a number of times, I believe, first the NCCD, National Counsel on Crime and Delinquency, has recommended that no more that 10 percent of the arrests should be detained, if proper detention screening is being done.

Q. And the 10 percent refers to a secure detention?

A. Yes, it does. Very few places have a nonsecure network that we have.

• • •

[213] Q. Based on your experience, what factors account for the drop in the initial admissions of, let's say, JDs to secure detention over that 3 day period that you gave us?

A. There are a variety of issues. Basically the 1 to 3 day stays are not court remanded, although there will always be exceptions to that. These are basically children who are admitted on arrest and then brought to court within the 1 to 3 day period that's required by law. At that point there can be [214] several changes. The parents could have already come to detention and picked them up when they weren't available when the policemen took custody of the child.

The secure center itself or nonsecure center could have released the child to his parents when it got in touch with them. The child could have gone to probation and they could have diverted or adjusted, or dismissed the case. It could have been, the child could have been released at the end of a hearing in Family Court when he would have been, again, dismissed, released to a nonsecure setting, released to any agency or sent home.

• • •

[217] Q. Doesn't every secure facility in the state have screening personnel at the facility?

[218] A. Yes, it does.

Q. What is the purpose of those screening personnel as [ ] at Spofford?

A. There are two levels. One, is this a legal detention case and can the child be admitted or does the child need to be held securely or can we transfer the child to a nonsecure facility.

• • •

Q. What is the first obligation, if there is any, at the secure facility when a child is brought in?

A. The first obligation is to determine if the child can be legally detained; if there has been an arrest or if there is a warrant or if there is a court order for the detention. The second obligation is [to] determine[] if the child needs to be held securely or can be held nonsecurely.

• • •

[220] Q. Who determines whether an alleged juvenile delinquent or a JO who is in the Family Court system should be detained secure or nonsecure?

A. The administrators of the detention program in the locality where the child is to be detained.

The Court: Who did you say was that?

The Witness: The administrators of the detention program. In the city it would be a decision made by the assessment unit of the Department of Juvenile Justice.

• • •

Q. The determination for children who have appeared in Court under 739, is there required to be any determination by the judge before the local agency [221] determines secure versus nonsecure?

A. Just the general detention remand and then the agency would make a secure-nonsecure decision based on the information it could gather.

• • •

[227] Q. Is a detention order under article 7, the 739 order, is that the same as or different from a shelter care remand?

A. Detention remand is a remand in our system, at least, a remand for supervision, authoritative supervision and a shelter remand, while it is not my [228] jurisdiction, I would assume would be for protection or for some other dependency need.

Q. The nonsecure detention facilities that you had reference to, do they come under the 739 rubric of detention or under shelter care?

A. Nonsecure detention comes under 739.

Q. Do you have any information available to you, Mr. Bigley, as to whether or not children admitted to detention are admitted one or more times?

A. Our admissions are broken down by first admission and readmission, basically to the same facility. But since most of our kids are held in their own counties, that's fairly reliable data. Only 51 percent of all our admissions are first admissions to secure detention. That's based on our total figures, male and female.

Q. Would you mind telling us a little more clearly, what is the implication of that. What conclusions can you draw about the balance or what data do you have about the balance, that is other than the 51 percent?

A. The balance would have been children who had been admitted before on either other prior charges or on the same charge but something else had changed in the meantime. For example, a child who was detained and then [229] released home and absconded from home or missed a court date, might be redetained, that would be a readmission. But if the child was brought to court and remanded back to detention the same day, that would not be a readmission.

• • •

[233] *Cross-examination by Mr. Guggenheim:*

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[234] Q. Mr. Bigley, you indicated in your background that you were involved in the publication and writing of the report Juvenile Detention in New York State 1977 policy and Practice [Petitioners' Exhibit 36 for identification], is that right?

[235] A. Yes.

Q. Did you write this report?

A. I wrote sections of it. It was a four-person, four different people writing on it.

Q. Are there negative affects of detention on juveniles?

A. I would say that there are negative affects of inappropriate detention.

Q. At page 19 of the report of 1977, it is indicated that punishing, treating or evaluating the child at the time of detention may be an error for the facts of the case have not been established?

• • •

[236] Q. Do you concur with that position?

A. In context, I don't know how many people have read the report—the issue there is to detain, you should detain to hold for court or to hold for or at the direction of court and to detain for the purpose of one of those other services, I would support yes, it is an error. Not to say that those services don't exist and not to say that those services aren't beneficial in terms of the program. But to detain for those purposes would be an error.

Q. Are there harmful affects of secure detention, on a juvenile?

A. Potentially.

Q. In fact, at page 20 of the report, it is written that the most subtle but perhaps the most harmful effect of secure detention is the creation of and the impression left by a high security atmosphere which is concerned about possibly breaking out and physical attacks against staff.

[237] Do you agree with that statement?

A. Yes. I think you should also—to put that in context, it was written at a time when there were status offenders

and delinquents and the full range of charges before the Court in detention facilities. And at that point the problem was you had to gear up for the most difficult to handle and that was oppressive say, for example, status offenders. At this point we removed all the status offenders from secure detention statewide. We are now geared up for a more consistent population.

Q. Do you regard the detention center at Spofford to be one of a high security atmosphere?

A. To some extent, not high security the way the adolescent unit [for 16 to 19 year olds] at Riker's might be for example.

Q. How about high security in the way it was written in this report, sufficient to potentially affect or harmfully affect the juvenile?

A. My memory of what we were writing about there isn't strong because because it was some years ago. There is a potential for that.

Q. Spofford was one of the institutions about which you were writing in 1977, isn't that correct?

A. Yes.

Q. Isn't it correct that Spofford is significantly [238] more secure today than in 1977?

A. Yes.

Q. Are there bars on the windows?

A. Yes, there are.

Q. Now, we have already heard testimony that there are juvenile offenders being held in Spofford, is that right?

A. Yes.

Q. Juvenile offenders are actually prosecuted in the adult court today in this state, right?

A. Yes.

Q. So that juvenile delinquents are now co-mingled with the category of persons who are being prosecuted through the adult court system, is that right?

A. Yes.

Q. In fact, at Spofford, juveniles have to undergo strip searches on occasions, isn't that right?

A. There are strip searches, yes.

• • •

The Court: You mean there are strip searches in Spofford in terms—is that in the terms defined in [239] the adult area?

The Witness: You see that's one of the problems. A child admitted to Spofford is taken into a side room where he changes clothes. We are not talking about cavity searches. We are not talking about—

The Court: All right, then you mean the child has to strip down, but there is no cavity searches?

The Witness: Right.

• • •

[240] Q. How does one enter the building into Spofford? Is there a security control monitor at the front?

A. Yes.

Q. Within the rules in part 180 that were shown to you by the Attorney General earlier today, there is provision for imposition of room confinement on inmates at Spofford, is that correct?

A. Yes.

Q. Is that the same room confinement provision that another court in this courthouse designated as solitary confinement, if you know, in the *Pena* [case] against [the] New York State Division for Youth case?

A. I'm not familiar with the other case and I [241] can't make the comparison. Room confinement is carefully controlled. Considering that the facility is designed to be a secure facility, I think there is actually very little formal room confinement.

Q. It is true, is it not, that a high percentage of the inmates at Spofford are already convicted juvenile delinquents?

A. I don't know how you define high percentage.

Q. 40 percent?

A. It sounds possible. Maybe out of 180 children in care, 40 or so, perhaps as many as 50 might be placed with the Division already.

• • •

[244] Q. You were asked earlier on direct examination information concerning the National Counsel on Crime and Delinquency's 10 percent figure. That 10 percent figure is actually the maximum number of appropriate detention[s] [ ] rather than an appropriate number, isn't that right?

A. No. I don't think there is any maximum to it. I think it is something that most people, most states, [245] most jurisdictions do more than that and they were looking and saying, you know, where we have seen it working well, it was working around 10 percent and that should be the number you strive for.

Q. Now, in fact, the NCCD statistic reflects children up to 18, isn't that right?

A. I don't know that.

Q. Well, do you know how many states in the United States limit jurisdiction to juvenile delinquents to 16?

A. Five, I believe.

Q. Of which New York is one?

A. Yes.

Q. You mentioned Los Angeles County and they are a fairly high detention facility. Do you know if California limits jurisdiction to 16 as does New York?

A. California breaks theirs up into several different categories. They have, for example, one age group that goes to 23.

Q. And are 16 and 17 year-olds in Los Angeles County held in the juvenile detention facility?

A. I believe so, yes.

Q. Now, in New York State 16 and 17 year-olds brought before the Court on criminal charges, are they [246] held in juvenile facilities?

A. No.

• • •

[248] Q. Let's move to some of those considerations for what we could call screening. Is that the term used in determining who is eligible for nonsecure detention?

A. Yes.

Q. What are some of the factors that go into that decision?

A. It is a variety of factors. The charge, prior history, juvenile justice record, whatever the charges, the family situation, the peer group situation, the emotional level of the child, his impulsiveness, susceptibility, internal, external control. It is not made on any one factor.

We have in any category, kids who are detained and kids who are released. It is a combination or amalgam of

factors or number of factors that come together as opposed to any one factor.

> The Court: We are now talking about, I gather, you are now talking about people in charge of the centers. [249] How do they make a determination about the child's emotional problems?
>
> The Witness: Basically in an observation, when they see them, coupled with some consideration of that in his record. There are certain children who are constantly in trouble with other kids. That's a different kind of thing than a child who is constantly in trouble alone.

• • •

Q. In fact some children are automatically not considered for nonsecure detention simply based on the charge [in] their case in court, right?

A. There is a level of heinous crime that would certainly knock the nonsecure decision, sway it radically.

• • •

[256] Q. Returning to the potential harmful effects of secure detention at page 21 of Petitioners' Exhibit 36 for identification. • • • You wrote or the report states that, "There are other potentially harmful effects of secure detention. There is the potential of contamination of the less sophisticated by those more sophisticated in crime. Potential exposure to violence in detention facilities is [257] present, assaults, suicides and rapes in detention facilities have been documented by various authorities". Do you subscribe to that statement?

A. I'd like to point out as I did before that the range of population in the facility has changed significantly and that we are not talking about going from truants to murderers in secure centers any more. I can tell you that incidents do happen in secure detention facilities and I can also tell you that they are not common. So to that extent I subscribe to that statement. The situation has changed radically since that document had been written because of the de-institutionalization of the status offenders.

Q. In Petitioners' Exhibit 37 in evidence, Division for Youth broke down the charges, the highest charge against an accused delinquent which resulted in detention and those charges included trespass and burglary and prostitution, promoting gambling, unauthorized use of a vehicle resulted in a total of 47.2 percent of the detention population.

Now, accused murderers are kept in Spofford, isn't that right?

A. At this point, yes.

Q. Convicted murderers?

[258] A. To some minor degree, yes.

Q. So to the extent that we are dealing with a child charged with a very minor offense, would you ascribe to this statement in your report in 1977?

A. Factually it is still true, but the range of population that made it important in '77 is not there any more.

The Court: What does that mean, Mr. Bigley? In view of your answer to Mr. Guggenheim's question, what does that mean?

The Witness: In 1977 we were dealing with a JD population mixed with a status offender population so we had the potential for having anything

from murderers to truants in the same place. We don't have that possibility any more.

The Court: I thought you indicated that there was a possibility of juvenile delinquents accused of lesser crimes and convicted murderers being together at Spofford? I thought you said that was possible?

The Witness: That is possible right now, but I don't think that that range of problems or range of charges is as important in terms of the harmful effect of detention as it was when the range included the whole bottom half of the spectrum with the status offenders.

• • •

[260] Q. You would agree, would you not, with the proposition that the detention of a juvenile who was ultimately placed into the community—withdrawn. Among the negative effects of detention found in the 1977 study, Petitioners' Exhibit 36, was the alienation factor caused by the detention of a juvenile which is contradictory to the ideal goal of a community placement, is that a statement with which you subscribe?

A. Could you repeat the statement. I'm not sure I understand.

Q. That the alienation factor in the detention is contradictory to the ultimate goal, the ideal of a community placement?

A. I would say to the extent we are committed to the least restrictive environment, that we don't want to securely detain children who are going to end up in foster care or group homes in the community. Frequently the

situation changes during the course of the detention or during the course of the court trial. I don't know how you could predict their placement at the point of arrest or the point of taking them into custody or the [261] point of a 739 proceeding.

Q. I appreciate you don't know how to predict that and I don't either. I am not asking you how one does that. But to the extent that the ultimate placement is with the home or in the foster home, would you regard the detention as possibly or even probably unwise?

A. I would say possibly. I would not say probably.

• • •

[265] Q. Now, one of the bases for admission to detention is the prediction that if the juvenile were not detained he or she would commit a crime before the case were heard in Court. Right?

A. Right.

Q. In your report in 1977, you indicate that essentially the studies show that within the limits of current knowledge it is not known what factors predict probable nonappearance at court or future crime commission on a valid empirical basis. Is that a position that you still hold today?

• • •

[267] A. I would answer that by saying that quantitatively, statistically, I cannot predict what anybody is going to do at any level. However, I think we can assess a serious risk that some other kind of behavior will happen based on a number of factors and the amalgam of those factors that--including past behavior, current community

situation, personality, mood, any of those things as we see right in front of us at the time of assessment.

The Court: I understand everything but what do you mean by "current community situation"? That I don't understand.

The Witness: The relationship that the youth has with his family, with his peer group, with his school, with his work situation, all these things can give us an indication of stability in the community of the kind of support the child is likely to receive in terms of not [268] committing another crime.

• • •

Q. Returning to your report at page 14, you wrote that section 739 establishes a policy of preventative detention for juveniles. Then at page 15 you wrote that once a policy of preventative detention is accepted, the [269] problem of determining who will commit another crime during the court process remains. Is that a proposition you agree with?

A. That's still a problem, yes.

• • •

[275] Q. Now, you used a figure for arrests, 93 plus thousand, is that right?

A. Yes. 93,184.

Q. Where are those figures taken from?

A. That was a report from DCJS on 1978 juvenile arrests.

Q. Are all those cases processed in court ultimately?

A. I don't know that.

Q. Do those figures include arrests by police which are resolved at the precinct house, for example?

A. I don't know that. I would assume, but I don't know that.

Q. Assuming they are and assuming that it also includes the cases which come to court and are adjusted, the percentage of delinquents held in detention would be [276] much higher than the figure that you already gave in your testimony, relative to the cases which are processed in the court, right?

A. The numbers would change but your statistics would be invalid.

We reach a point where you start to say, well, you are doing something wrong because you are detaining a lot and what you don't know is that what you are doing is having these great diversion programs and these great adjustment programs and probation intake is doing great and so relative to the petition rate or the number of cases that go to disposition, you detain a lot.

The broader the criteria for base numbers, like the number of arrests, the more reliable your statistics are. Every time you come up from there, you start to penalize an area for having a good diversion program or a liberal sense of who to charge and who not to charge after arrest. That's why we deal with such large numbers.

Ideally we do it on percentage of youth population.

• • •

[277] Q. Now, you found in your report in 1977 at page 99 that a higher percentage of judges than other professionals saw the purpose of secure detention as protection of the community. Is that right?

A. I don't have a copy of the report in front of me. It is possible.

Q. Let me show it to you and ask you if it is the position you still hold.

A. I don't know if the judges are still at the top of that category.

Q. But they were then?

A. Based on the information we received.

> The Court: You mean they changed in two years or three years?
>
> The Witness: I think that a lot of agencies that work with kids have taken a more conservative attitude in the last two or three years. I am thinking perhaps especially of the police, at this point [who] may [278] outrank the judges in terms of importance of community protection.

Q. I know we have gone over this but I do want to ask you one more question about predictability that comes from your report and ask you if you still hold this position today.

You say that in essence at the bottom of page 94 of your report, in essence, the serious risk criteria establishes a policy of preventative detention for juveniles. It amounts to a deprivation of liberty on the chance that future behavior will be delinquent before the facts on the current delinquency are in.

Is that a position you still hold today?

A. I think that's the situation we find ourselves in, yes. But I think that the criteria are still, are useful despite that.

• • •

[280] Q. Now, we have had some testimony concerning nonsecure detention. What are the total number of beds in New York City available for—

A. In nonsecure? 56 beds.

The Court: In the whole New York State?

[281] The Witness: No, in New York City.

Q. Would you say they are about 60 percent utilized?

A. I can't speak for today. I would say the average utilization is probably 60 percent. Although I know they were almost full within the last month.

Q. So that on the average 33 or 35 beds are used?

A. 36, 33, 40, 30, sure.

* * *

[285] Q. Do you know what group confinement is?

A. Yes.

Q. What is it?

A. It is the isolation of a group from the regular program.

Q. Is that ever performed in any of the detention facilities around the State?

A. It is a possibility.

Q. Is it punishment of an entire group?

A. I wouldn't use the word punishment, but it is of an entire group.

Q. Are inmates ever handcuffed in the detention facilities.

A. Inmates should only be handcuffed for transportation reasons. If it is happening beyond that, it is not something that we are aware of.

[294] *Redirect Examination by Ms. Gordon:*

• • •

Q. You were asked on cross-examination whether you felt that there were some possible or potential effects to detention and/or to secure detention.

Briefly, because it is getting late, do you have a view as to whether or not there are any potentially positive effects from detention, either secure or nonsecure?

A. Potentially, certainly. The impact of being addressed by the system and what that means in terms of [295] what you are going to do next, the idea of what you may learn there about the system and that it is going to impact you makes a difference, not to mention the effects of the community, of the community protection issue. You are dealing with kids who may be doing a lot of harm in the community.

• • •

Q. It is a mandate in this state, is it not, that you are responsible for enforcing that the least [296] restrictive alternative be found for a juvenile who is detained.

A. Yes.

• • •

Q. Is it consistent or inconsistent with the policy of this state to hold a juvenile in detention merely to give him impact, shall we say?

A. That would be inconsistent in terms of the overall policy. I think we have to differentiate between what gets the child into detention from what we want to do with the child when they get there.

A child shouldn't go to detention for treatment, punishment, impact, to teach him a lesson or [297] any of those

reasons. A child should go to detention for community protection issues before he goes to court. However, when we have a child in care, we have a variety of things—we have recreation programs, adult to child contact, which has been defined just that way as treatment, any significant contact between kids and adults. Hopefully positive.

This is why the potential for harm in a detention facility is equally balanced by the potential for good because there will be contact there and there will be impact there just for those reasons. But it is not why they get there. It is what happens when they are there. That's different than why they get there.

Q. In the course of your cross-examination you were asked whether or not there were bars on the windows of Spofford.

I want to ask you whether or not any other secure detention facilities in this state has bars on its windows?

A. Not to my knowledge.

Q. Do you know why Spofford has bars on its windows?

A. Yes. In August of 1978 when the juvenile offender legislation was passed and they had to open [298] Riker's Island to put the juveniles in there, it was because Spofford was deemed not secure for the violent charges. Even those kids as JDs had been there before. There had been 130 escapes a year from Spofford and, considering the impact of the violent crimes, the juvenile offender crimes, they felt a more secure facility was necessary. But Spofford was geared up or was to be geared up. Riker's was always a temporary solution.

• • •

[299] Q. Is it also a matter of policy that the—the State policy that the nonsecure detention alternative is an alternative to be considered no matter what the crime [300] or criminal act the JD is charged with?

A. Yes.

Q. In other words, there is no set of criminal acts, juvenile offenders, designated felons, then, for that reason, that are precluded from the nonsecure detention alternative?

A. No. Any of the charges are eligible for any kind of detention. We have had juvenile offenders in foster care detention programs upstate as an example.

Q. You made several comments with respect to the serious risk of another crime criteria in the course of your cross-examination.

I would just like to know from you whether or not you have given any consideration to a further elaboration of criteria under that serious risk standard and if you have given some consideration, what was the substance of it?

• • •

[301] A. Yes. We have given that regular attention over the last two years.

Q. In what context do you give it consideration? Is it regulatory or how would you come to consider that as the director of detention?

[302] A. Both. In a regulatory [context] because in March of 79 we last filed our "Regs" and we are already doing revision on them in another filing. And in the context of that, we have done it for regulations. In addition we have been publishing on a more or less regular basis

guidelines and advice, if you consider it that, from a technical assistance agency for detention facilities on what they should be looking at.

The problem we have been having in that trying to develop these guidelines all we have ever managed to do is to change the kinds of words that need to be defined[. A]s hard as it is to determine serious risk in a quantitative way[, i]t is equally hard to determine any other factor that we have been able to substitute. To embellish the serious risk criteria with a listing ends up with a rigid list that gives us either no option in terms of letting kids go when we don't think they need to be securely detained, and we end up detaining more than we need to or not to detain kids who we think need to be detained because the list doesn't add up to the right number of boxes.

We have been, I feel, very successful with the admittedly subjective kinds of assessments that are currently being done, to wit, our low percentages.

[303] The alternatives that we come up just haven't been worth publishing or putting out. We have done the guidelines sheet which I have here and which will be [out] by the end of March a policy change for us. It is an embellished list, but its embellishment is its increased concentration on not detaining and detaining nonsecurely and not really on trying to determine how you can define serious risk.

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Testimony of Leslie T. Wilkins
(Excerpts)

[306] LESLIE T. WILKINS called as a witness by Petitioners, was duly sworn and testified as follows:

Direct Examination by Mr. Guggenheim:

* * *

[307] Q. Professor Wilkins, by whom are you employed?

A. Temporarily, I am visiting professor at the Simon Fraser University in British Columbia but my permanent appointment is with the State University of New York at Albany. At Simon Fraser my position is that of professor of criminology, visiting professor of criminology, and at the State University of New York, professor of criminal justice. The school at Albany is of course a graduate school.

Q. How long have you been at the school of criminal justice?

A. I believe 1979, I think it was 1979, yes, it was.

* * *

Q. Before that your regular appointment [at SUNY/Albany]?

A. Prior to that I was at the University of California, Berkeley, for four years and for some part of that time, dean of the school of criminology.

[308] Q. At the Albany school of criminal justice, 1979?

A. 1969.

Q. So that you were there for 10 years?

A. Yes.

Q. And then you were at Berkeley—

A. Previous to that from about 64 to—no, 66 to 69.

Q. Have you recently participated or engaged in any research projects?

A. That seems to be my continuous activity of one kind or another.

At the moment I have two contracts from the Institute of Justice, the research body of the Department of Justice. One of which is the writing up of the history of the guidelines developments for which, I suppose, I must take a certain amount of blame, and the other one is in connection with sentencing more from the exploration of aggravating[-]mitigating factors[. S]eeing whether it is possible, perhaps, to quantify the idea of culpability, perhaps similarly [ ] [to] the ways we have worked with the concept of seriousness in relation to crime.

The guidelines of the federal parole board, of course, were developed by myself and my team and I have had some contracts from the Ford Foundation, research [309] grants from the Ford Foundation. I am currently consultant to the United Nations in relation to the forthcoming Congress on crime prevention to be held later this year.

Q. Have you received any honors or awards in your career?

A. Perhaps I should mention two of them. Yes, I'm afraid so. I seem to have accumulated a lot of paper on the wall.

The one I am proudest of is the one from the British Royal Statistical Society. I liked it then because it was a money prize. It is a very old established society and that

was in relation to the First Epidemiologic Study of Deafness and that was before I became really too closely involved with the criminal field.

The Sutherland Award for distinguished research of the American Criminological Research Study in 1972. There are a few others.

Q. Have you been honored in your university role?

A. Distinguished—I forget the exact title, distinguished teaching award or something like that. Outstanding Educator.

Q. Have you held any editorial positions?

[310] A. Quite a number. I still hold two. I'm on the editorial staff of the Journal of Criminal Law and Criminology. That's the Chicago journal, and the Journal of Research in Crime and Delinquency and also the Georgia Journal of Criminal Justice.

The Court: Am I correct that your own educational background is chiefly in England, is that correct?

The Witness: It was indeed, sir.

• • •

Q. Did you obtain any degrees or certifications?

A. I am a fellow of the Royal Society by certificate and also a fellow of the Association of the Incorporated Statisticians.

In the United Kingdom degrees in those kind of subjects, the higher degrees, were not granted at that [311] time and, indeed, as you perhaps know, your Honor, surgeons in England insist on being called mister which is regarded as a superior to that of being called doctor and so, I regret, that I am still a mister, in that respect but a fellow in those two societies.

> The Court: When did you start * * * a concentration on penology?
>
> The Witness: In 1953[. M]y first piece of research in this field was in collaboration with Professor Herman Mannheim.

* * *

Q. Have you published any major books?

A. Yes. My first one in this field was [ ] Prediction Methods in Relation to Borstal Training which was carried out in 1953 and published by Her Majesty's Stationers in 1955. That was a statistical analysis, or research study, perhaps. Then a theoretical work, Social Deviance, in 1965, Evaluation of Penal Measures, which is a methodological text, and quite recently a piece on bail, but that was done in relation to the Australian legal system when I was attached to the Institute of Criminology in Canberra recently on sabbatical.

[312] Q. Could you indicate to the Court any relevant articles that you may have written relating to criminology or prediction?

* * *

A. Yes, I can't recall the title. I seem to always be writing on the subject of prediction. It was my first study in this field, and I have tried to get away from it from time to time in order to diversify my interest.

A lot of the work is reprinted in various texts. Well, I began of course with Prediction Methods in Relation to Borstal Training. We started with approved schools which was a younger age group using the same methodology, and prediction has of course been a tool in a very large number of research studies, not directly focused as such, but one of the tools that one had to use, of course, in the guidelines for the United States Parole Commission.

Q. Let me show you this document [Petitioners' Exhibit 40 for identification] and ask you if you recognize it?

A. Yes, I do. It is my curriculum or resume.

• • •

[313] Mr. Guggenheim: At this time petitioners move that the witness be recognized as an expert.

The Court: In what?

Mr. Guggenheim: In criminology and prediction of behavior and statistics.

• • •

The Court: All right.

• • •

[314] Q. Professor Wilkins, have you read Petitioners' Exhibits 1 to 28-A in evidence?

A. Yes, I have.

Q. Do you have an opinion respecting the accuracy of prediction in those documents of future behavior?

A. I would say that the accuracy of the predictions would be minimal. There are roughly three levels at which prediction can be carried out and these would fall into the lowest level of expected precision.

The difficulty [ ] with subjective assessment of this kind [is] that there is not even a check list of the information which is used so that it is not even subjectively systematic.

I would characterize the order that has been found of efficiency of prediction to be the actuarial method, which has always been superior or certainly never inferior to clinical.

Q. Could you explain the distinction between actuarial method and clinical method?

A. By clinical I would assume a somewhat systematic and ordered subjective assessment of data and by actuarial I mean of course where the data are standardized, weighted and subject to the rigors of contemporary decision theory and statistical analysis, [315] and comparisons have consistently shown that the actuarial approach in terms of the number of right predictions is superior to prognosis of clinical order. Of course the clinical being systematic is, again, in order of difference from the, shall I say, wide open subjective.

The difficulty with the exhibits is that one really does not know what information the decision maker has even used, let alone know what weight is attached to it.

> The Court: • • • Differentiate so that I will be able to understand what would one do if one made a clinical approach and what one would do if they made an actuarial approach.

A child comes in, as you know, has committed a crime and is examined and based on various, whatever, I don't know whatever the information is, a decision is made that he probably will commit another crime so that [316] therefore he is detained.

Now, how would one do that if one used the actuarial approach and how does one use the clinical approach?

The Witness: Your Honor, a subjective assessment relies on the individual skills and experience of the individual making those assessments. Whereas with a statistical approach, you are combining the expertise of a very large number. You base your assessment on a sample which is followed up in time and which is irreplicable by other people because specific weights are given to specific items. You know exactly what those items of information are and whereas even in the clinical you still really don't know whether the person is using information that he shouldn't use. When I say shouldn't, I mean either in terms of efficiency or perhaps in morality. Whereas with the actuarial at least you know that the individual is not using information that he shouldn't use.

The Court: You are using subjective and clinical interchangeably?

The Witness: Clinical is somewhat subjective. But it can be systematically subjective.

The Court: That would make it clinical?

[317] The Witness: That would make it one grade above the subjective as such. Indeed I have

no objection, your Honor, to the use of subjective data, except that we have found it wanting in the studies we have done.

If I may give one example. The subjective decicision maker and even perhaps the clinical sometimes are inclined to assume that behavior or characteristics that annoy them personally are going to—well, things they dislike even, are also therefore prognostic of bad behavior.

In fact we did a study once some years ago when I was at Berkeley looking over parole and probation reports, mainly probation officer reports, to try to find the words which would most likely result in the individual losing his liberty. That word, the most killing word, if I can use the term, was "uncooperative". Now what precisely does that really mean? That is my question.

Obviously we might like to reward a person who is cooperative, maybe that's right, but I can say it isn't predictive. In a sense I say it is not right to reward cooperation or uncooperativeness but I am saying if it isn't predictive, then it shouldn't be claimed that it is predictive and used as though it is such. That is [318] in fact what is inclined very much to happen.

Q. Are there other examples of elements that may be taken into account in subjective evaluations?

A. Yes, I'm afraid there are quite alarming evidence at times.

Governors or wardens of institutions in general are inclined to believe that the person who is a troublemaker in the institution is usually a quotation mark, in other words, it means somebody who hasn't gotten on very well; is a person who is not going to succeed. There is no correlation between behavior in the institution and subsequent behavior on the streets.

The really efficient criminal knows how to behave in the institution and that perhaps wipes out that effect.

Nevertheless, in the subjective assessment, I am quite sure, indeed in the Borstal study, we have evidence of this [. G]overnors tended to overweight the behavior in the institution such that they spoiled their predictions that they could have made if they had been totally unaware of that fact. If I remove that data item from them they would have done better than they in fact did.

This is the difficulty. We don't know whether [319] the clinical—well, sometimes we know the clinical because there are sometimes standard instruments. But we still don't have the degree of control and matching that we have if we transform that to the next level of actuarial, if one is really going to make predictive statements and not statements of value.

We have sometimes found that race has appeared as a prediction. Sometimes it has been possible to suggest that that is a data item which is a surrogate for other features of society, like unemployment and the other disadvantages that minority groups suffer. If we replace that data, we can sometimes show that maybe race was not—there are other occasions when it has been very persistent.

If you are dealing with an actuarial approach and if race is in fact being weighted, you know that it is. If you know that it is, you can cut it out if you don't want it there. I would suggest that data items over which the individual has no personal control may well be regarded as immoral to use. And with a statistical system, that is under control. With a subjective system it is not under control, and we know precisely, of course, how many false positives, how many incorrect predictions we make when we are working to an [320] actuarial model.

Q. • • • Do you have an opinion concerning the probability of the predictions made in petitioners' exhibits [ ] being right?

A. Well, there is really no handle that one can get on that kind of data. Clearly it must be less efficient than actuarial because even where strict comparisons have been made with clinical and actuarial, and there have been scientific studies of that, the actuarial has been superior and these are considerably inferior to that.

Furthermore, the prognosis that one can make can never be better than the information on which it is based, and we were able to get certain levels of prediction where each indication with people who are trained to do that and nothing else took half a day. We have standard experience on building the first stage of [321] actuarial tables from the input, the data scan operation. I cannot get more than two cases a day out of my workers. That is because we don't drive them. That's it. And even with that level of input, we get false positives of 8 to 1, 10 to 1; for every one right, you will get 10 wrong.

Q. Can you explain the term false positives?

• • •

A. He has the profile which fits the kind of people who'll fail, but he doesn't. You cannot discriminate the profile of the failures from the successes in that group. So you are working to the profile of the individual and hence you will classify this individual as a likely failure and that's all you can do, and the true failures among those who have that constellation of characteristics depends on how frequent the event you are looking for is.

If you have a population that I divided up roughly 50-50 in reality, then prediction is very much more efficient than in the number you are looking for. We usually prefer the base rate, which is smaller and as the base rate goes smaller and smaller, so you are more [322] and more likely to make a wrong false positive decision about by, as it were, being [ ] excessively risk aversive.

Q. The [ ] base [rate] term that you used, could you clarify that a little more. What does it relate to in the group?

A. Well, the actual percentage that fits into the category with which you are concerned[. I]n the Borstal study we were extremely fortunate, and one of the reasons that the prediction there was pretty good was not only my skill but it was the fact of luck that—well, with this particular population about 55 percent committed more crimes, in other words, we were getting to that 50-50 point where statistical methods are the most powerful.

Now, as that rate drops, the likelihood, for example, of a person who has committed a violent crime, committing another violent crime in a given interval of time that probability really begins to get very, very small. So as you subdivide the groups or as you truncate time, so the percentage

in the category you are looking for diminishes until you get to the proverbial needle in the haystack which not even statisticians can find.

Q. Now, if you made a prediction about an individual that he would do something and he in fact did [323] that, what would he be known as?

A. That would be a true case, true positive. If the prediction is correct, that's okay. If he fits the profile and doesn't behave according to the profile, that's a false positive.

Q. Now, assume that the predictions in petitioners' exhibits that you have read were based on recommendations made by an individual who interviewed with the juvenile and other parties, other persons, in an interview that took from 10 to 40 minutes and in that interview the interviewer may have asked questions about the particular act that brought the juvenile to court and may have asked questions about the child's school record, parental opinion of the child and also determined the child's prior record in Court, if any, and based on that interview process recommended to the Court in the exhibits that you have read that the child be detained because of a belief that he or she would commit a crime, do you have an opinion concerning the probability of that prediction being correct?

A. I would be surprised if it was any better than just chance, surprised.

My experience only relates to much more sophisticated data analysis. Using similar subjective [324] methods but where the assessors have lived with the youth in institutions and small institutions, generally less than about 100,

for nine months before making the subjective prognosis about further crime and in those cases they were only 4 percent better than chance.

For the record, I believe the correlation was about .15 and that means about 4 to 5 percent better than chance in that case, which is pretty poor even where these methods are used and the individuals have been in the same environment as well as all the records that are available.

So if you ask me to guess, maybe 1 percent better than chance would be the maximum I would expect.

• • •

[325] Q. • • • [D]o we know, by the way, the base rate for the adolescent population in New York State for the commission of crime?

A. Well, it would be many, depending upon how that is cut. I could make an estimate if I could define precisely what one means in terms of age and are we counting convictions and arrests. There is a big difference between conviction and arrest. What constitutes the word crime? Adjudication or whatever? I would be able to make a guess on one of those for a particular age range or something like that.

[326] Q. Let's say an age range of persons 10 to 16 years who have or who are likely to have actually committed, to have been proven to have committed any crime in the penal law?

• • •

A. Well, found guilty of a crime in the population, adjudicated is this? The difficulty, when you say what is the level of crime, there are so many definitions that you can use. If you take self-report of crime, you get merely 99

percent of people having admitted to committing a crime. When you take victim studies, when you survey victims, you get 4 and 5 times in some categories and less with others. Such as in the F.B.I. data you can get another figure. With arrests you get another figure and it is a statistician's nightmare apart from anybody else in trying to make sense out of the way it is charted up.

I'm not sure what you are really trying to get at.

[327] Q. I am limiting the question to a situation where a person will actually be convicted of committing a crime but who may not necessarily have committed any crime at this point.

A. In the population.

Q. And what the [ ] base [rate] would be for persons 10 to 1[6], if you know? Or if you could guess.

A. There have been studies for this kind of thing and I really couldn't catch that figure reasonably at the moment. I would rather not. But it would be pretty small, really quite small.

I think in the course of a long period of years, I remember seeing a figure that up to the age of 17 or 18 there is about a 10 percent chance over a whole long period of years.

Q. When you say pretty small earlier in your answer, you mean smaller than 10 percent?

A. As you begin to chop time dawn, so that is going to get smaller and smaller.

Q. Let's assume a [ ] base [rate] of 10 percent of crime in the population, commission of crime over a one-year period. When you said that there was at that time at best a one percent greater probability of chance that the

prediction in the exhibits would be correct, [328] could you interpret what that would mean in terms of false positives and true positives in the detention figures?

Out of 100 children who would be detained based on a prediction that they would commit a crime and how many in fact would commit a crime if they were not detained?

A. Well, actually the best thing under those cases would probably be to use the base rate and not to attempt prediction at all. Because where the base rate is very small, you do better by saying everybody is like the majority than you can do by carrying out any tests.

For example, first offenders, the various recidivism rates are known but let's suppose I take 20 percent charts of recidivism of a first offender and not true of all age groups and categories. Then the best assumption is to say that these people will not commit any crimes because it is very difficult to improve on the 20-80 that you have devised from the base rate.

So you have got, if you use the base rate and say everybody will be a success, you are only 20 percent wrong which isn't too bad for starters and then you have got to improve on that before you are beginning to make any headway with statistics at all.

[329] So where the base rate is very small, then the safest actuarial bet is to play the base rate rather than to try to improve it. Because it is extremely difficult to improve on that kind of estimation.

Q. But where the person making the guess or prediction takes the other side, what would be the situation with respect to those persons detained? What would be the probability of false positives to true positives?

A. It is difficult to generalize the case. I can only indicate that if one is looking for quite serious crimes, crimes of violence and so on, one does a lot worse than predicting the likelihood of other kinds of crimes. That with violence, violent offenders, the best piece of work so far was a very big study paid for by the national institute of mental health, I think, by Wenck and Emrich, and their best estimate of individuals [ ] followed up over at least two years was to get false positives of about 8 or 9 to 1. That was the best that could be done where the efficiency was 50 percent. Unfortunately this gets somewhat technical but if I am going to be truthful, I also have to be technical, unfortunately, here.

There are three figures to consider. What [330] percentage of the target population of the violence potential do I want to get? If I insist, for example, I must lock up everybody who is potentially violent, then I will lock up everybody. There is just no other way about it.

So as soon as I come off that, I must lock up 100 percent of those who are going to commit a violent crime, then I am entering into a trade off.

Now, supposing I even go to the point where I say I am willing to settle for getting 50 percent of those who will become violent. That's giving away a fair amount. I am giving that amount away because that brings me to the most efficient statistical measure. Then I will have 7 false positives to every right. In other words, I will have to lock up 8 to get one potentially violent individual and where those data are based on two years interval of time.

Now, if I start collapsing that interval of time, that false positive is going to increase very rapidly and if I

want to go beyond my 50 percent and get more, then my false positives are going to increase or to escalate at a tremendous rate until, of course, obviously I reach 100 percent who have to be incarcerated if I am going to insure that I get 100 percent people who will [331] commit violent acts.

So best one can see at the moment from the best methods possibility would be no better than 7 or 8 to 1. That's the best. I am not talking about those exhibits. Those are so unsystematic and, your Honor, I agree with your point. I can find no system so therefore I cannot really discuss them. It is beyond me to appreciate this at all from the scientific point of view.

Q. Let's assume that, again, we are assuming that the [ ] base [rate] for commission of a crime for the population involved in this case is 10 percent. If the length of detention were for 3 or 6 days, the period of time within which the person would be likely to commit a crime prior to trial, what opinion do you have concerning the likelihood of that actually being committed?

A. I can only address what I know from the data and one of the things that have shown up robustly of course in all countries and not only in the United States for which data is available, it is the consistent finding that the peak for reconviction, for recidivism is about 3 to 6 months after a release from an institution. I know a release from an institution is a different kind of issue, but in cases where probation has been awarded and probation without any incarceration at all, the person is [332] at risk of committing another crime the whole time from the day he leaves the Court, he is at risk and it is this exposure to risk that is of course, again, the data we worked with.

Similarly, there is a depression in the curve. It rises quite rapidly to about three months and then begins to fall off until about three years after that time, and the person is hardly more likely to commit another one than most of us have committed our first. The probability has fallen right down.

The majority of people who will ever commit another crime who have committed one and are likely to commit another will do so within three to four years.

Peak for returning would be between about 3 months to 6 or 9 months.

The Court: I think, professor, I would feel that the analogy seems to me to be flawed. In the first instance, as you understood in your example, the man had been incarcerated and spent time in prison. Secondly, he has been adjudicated guilty.

We are dealing now with people who have not been adjudicated. They had been caught as it were and had been turned over to authorities. They have not yet been adjudicated guilty and I'm not—well, I would [333] appreciate any analogy between that kind of situation and the ones where nobody has been told that he is guilty yet. He is at risk, as you use the term. But he hasn't had the imprint of the system as he had in the other two cases, which might be a deterrent.

The Witness: I agree, your Honor, that there is a possibility that we haven't explored the accused, not guilty, mainly because it is difficult to get data on that.

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The Witness: May I say, your Honor, that one has found such similar patterns of behavior where the intervention of the court or the intrusiveness of the action has varied so much and still one finds it much in the same shape that I would think that perhaps one would reasonably infer that it might be. I cannot say yes, I know it to be so but I would say it is a reasonable inference.

[334] Q. • • • In the studies that you have performed and are familiar with, is there a tendency to overpredict or underpredict the commission of a particular behavior?

A. Well, to always overpredict. There are two reasons. One is the base rate. If I may refer to one example here. There was 86 percent error [ ] rate among predictions to failure and 5 percent error rate among predictions of success and that's the Wenck's study which I referred to earlier. In another study, Kozal, et al., 63 percent error among predictions of failure and 8.6 among predictions of success.

Now the Wenck study is violence again and the Kozal study was more general and we have that similar finding. The interesting thing is that most laymen assume that to have committed an offense against the person is liable to be prognostic of committing another crime. In fact it isn't. It tends to be the other way around and this, again, is one of the reasons why uncontrolled subjective data—we don't know what people believe to be so and it may not be so.

[335] Q. Are there any other reasons for the tendency to overpredict?

A. In general, yes indeed.

In the system we have, the nature of the information itself reinforces a risk of aversive—I could use the word conservative, but perhaps that would be inappropriate. An avoidance of risk.

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A. Because decision makers normally take more punishment for their wrong decisions than they get rewards for their right ones, but in the particular case—in these kinds of decisions, you only get information back to you where you have made a risk accepting decision which was wrong.

You never get information back to you where you make a risk aversive decision that was wrong, because if you say, for example, "we believe this person to be a bad risk, we will not parole him," he is not then exposed to risk and you then have no knowledge that he would perhaps have been a success. That information never gets back to you and, of course, you can also—and this is useful if the decision-maker takes that view—say, "Well, the fact that he didn't fail is because I didn't grant him parole."

[336] So it's a self fulfilling prophesy which reinforces a risk aversive behavior because the rewards are not—the rewards to the decision-maker are not distributed equally between those two kinds of errors, nor is the information.

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Q. What was the age population of the approved school?

A. It was 12 to 15. I am tacking on the next age [337] group back from Borstal.

Q. Could you explain to the Court that study, the approved school study?

A. We applied exactly the same method, your Honor, as we did with the Borstal study, but obtained a rather lower prediction.

We couldn't quite explain that, but it was still—it was still fairly reasonable, but it was a lower rate of prediction, despite the fact that the base rate was also optimal from a statistical point of view.

There was one or two disturbing findings there and I prefer not to assert an interpretation. However, when we had classified the approved school boys according to their possible risk of recidivism, we were then able to look at the kinds of institutions into which they had been placed and the institutions, of course, had their own recidivism rate. Some in the main got pretty bad boys and some in the main got fairly good boys.

The intriguing thing was that where by chance if you took a wrong decision, a good risk was put in an institution where the base rate was worse, the good risk emerged worse than we would have predicted.

Strangely enough, conversely, where a bad risk went to a good institution, they emerged somewhat better [338] than we would have predicted, but for the average institutions they came out exactly as predicted.

There are various explanations of that, some of which—it could be technical, it could be due to the fact that the methods are not powerful enough to discriminate, or on the other hand we could say that there is a lad on lad effect as well as a treatment on individual effect that the culture in which the individual is placed makes a difference. I would not—I cannot discriminate those two possible hypotheses, but the data were interesting to us.

Q. Do you have an opinion with respect to the ability to predict behavior in juveniles as distinguished from adults? Which is easier or more difficult?

A. The base rate for juveniles may be a bit higher and for that reason it should be easier, but in practice it does not seem to be so.

It seems to be the other way, perhaps because they are still more volatile, more—is volatile a good word? Mobile or whatever. They haven't got so set in their ways and are more or less predictable.

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Q. Focusing your attention on the facts of this [339] case as they have been developed in the record, the Court has indicated the distinction between the nonoffender, the person only accused of committing an act, and perhaps the first offender or second offender who actually also could be involved in this case since they have come to court with an arrest, a previous conviction, perhaps.

Do you have an opinion with respect to the probability of a false prediction that a person with two previous convictions, brought to court on a third charge, is likely to commit a crime within the next four or five weeks of the arrest that brought him to court if released?

A. Well, the probability, given those data, are certainly higher than for a first offender and higher than for a second.

In fact, about the only thing which is predictive of subsequent recidivism is previous convictions. Previous other data are not very predictive.

That is the major element. The prior record is the major element in any prediction. But again, even where

that is taken into account—in fact, again referring back to the Wenck, * * *.

[340] They gave these lads the Minnesota Multiphasic Personality Inventory, which takes a lot more time to fill out than even to say. It is one of those enormous psychological tests that takes some hours or so to complete.

They gave them the California Personality Inventory and a number of others. Pretty well everything from the psychometrics available was given to these lads, but it added no information at all beyond that of previous convictions, and even then the false positive ratio was about 6 or 7 to 1.

* * *

Q. Seven people who would not commit the act for one who would?

A. Yes, unless one defined some very special subcategory of priors, some very special subcategory, a person with ten previous in the course of the last 10 weeks. If that was demonstrated, this would be a very rather interesting subcategory.

Q. The question I asked initially in this area of questioning had to do with the prediction that someone with two previous convictions would commit an act within a four or five week period.

[341] Could you give an opinion concerning the probability of false positives to true positives?

A. No. Not for that one subcategory alone.

I don't know what the average number of prior appearances is. In general, by two previous, the rate is then about twice one and by three priors you are then fairly high up the recidivism curve, but it's—none of these predictions so far would give us—even picking out the most restrictive

category, I am sure it would not give us more than 2 to 1, say, as a guess, an informed guess.

Q. 2 to 1—

A. Two false positives to one good one even with the most selective category.

Q. So when you said earlier that the best predictor or the best information upon which one can rely in making a prediction is previous record of conviction?

A. Yes.

Q. That would yield two incorrect—

A. That is an informed guess and I am having to make some quick mental calculations because various—a group of children with two previous is rather a rare example to find and I am trying to match that against older age groups. So it's an informed guess.

[342] Q. The 2 to 1 false positive to true positive guess is based on what period of time; what exposure of risk?

A. Oh, at least one year. To reduce that time I have no idea how that would behave, because I don't know whether with subcategories the same shape curve would hold, but it would certainly be much less.

Q. It would be less than 2 to 1, but you couldn't give an educated guess what a one month period of time would yield?

A. I don't know the shape of the curve for subsets.

Q. If we were dealing with one previous conviction and a one month period of time, would your answer be any different?

A. You would have to double it, approximately double the risk.

Generally it runs from zero to 1, to 2, to 3 doubling and then falling off at about the 75 or 80 percent recidivism rate.

Q. I don't mean to press you to give an answer if you can't, but if we dealt with a person never before convicted who comes to court, the prediction is made that that person is likely to commit a crime within the next [343] five weeks, is charged with an index crime in the FBI scheme a violent act, could you give an estimate of the probability of that act being committed?

A. With that kind of category, any actuarial estimate could not improve on the base rates. The probability, as you give the case, is so light, so low, so small that you would just play the base rates and, obviously, let him go.

You couldn't decide anything else because this is the needle in the hay stack problem, the probability is so small.

[344] Q. Do you have an opinion concerning the probability—accuracy of the prediction that a person brought before the Court for the first time, never before convicted, that is, would be likely to commit another crime within the next four or five week period?

A. It depends very much on what other data one has, but then given those kinds of data, the probability would normally be extremely small indeed.

Clearly if the individual is psychotic or something of that sort, then that would be a different matter, perhaps, if they were not in touch with reality, but the best thing to do with any of those—actuarially [345] the best thing to do with those small probabilities is to behave as if they were all successes. To improve upon that overall would be impossible.

The base rate would still be the best estimate. You can not improve on the base rate with such a small probability.

Anything you do to the base rate you will probably only be disturbing by moving A to B and B to A. Overall there would be no improvement.

You may improve it for one case and then change it back again in the next, but across the board, with a small probability, the base rate is the best bet overall.

If you wanted to make money on it, that's what you would do. You would play the base rate because over the long haul that would be the thing that would pay off.

In any one case you may be right or wrong, but taking a whole lot of decisions together you would be far better off to play the base rate and to bet that they would all be success[ful].

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[346] *Cross-examination by Ms. Gordon:*

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Q. Doctor, I call your attention to the fact that this [State's Exhibit B1] is entitled "Detention Screening Form."

As you can see, doctor, it calls for the entry of some information on the first two pages and when you get over to the third page there is a rating scale of [347] certain factors which culminate in a recommendation to detention authorities.

Now, I ask you, doctor, is that the type of form that you were talking about before when you talked about the systemazation * * * of clinical judgment; is that the type of form that's used sometimes to systematize [ ] [clinical] judgment?

A. This could be either a byproduct of a clinical or it could in fact have been—looking at it, I can't say whether that was a statistical or a clinical. Those weights may have been imagined or they may have been derived from analysis, I don't know.

Q. Certainly, they could be empirical weights or intuitive weights, is that not correct?

A. Yes.

Q. That's not what I asked you. I asked you whether this was the type of form to assist in decision-making.

A. Yes.

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[349] Q. Doctor, I would just like you to compare that for a moment with [State's Exhibit] B2, which is the form following, which as you can see on the first page also provides for the entry of some factual information and on the second page, the overpage, where it says, "Part 3, Recommendation", there is a blank with several lines for discursive writing.

A. Yes.

Q. I take it in terms of what you said before in your direct testimony, the absence of the weightings or specific criteria such as appeared on the prior form would lead you to conclude that this was essentially a subjective recommendation section without any particular guidelines?

A. It could be or it could be an amplification of the weighting system.

Q. Let's assume, doctor, it is not an amplification, it is a different form used in a different place.

A. This kind of form really—

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Q. Would permit the kind of subjective judgment you were talking about?

A. I would call that unstructured subjective.

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[350] Q. It is difficult, is it not, doctor, to determine with 100 percent accuracy what any given human being will do in the future, is it not?

A. A hundred percent is a subjective certainty.

Q. Do I infer from that, doctor, that it's impossible to determine with a hundred percent accuracy what any individual will do in the future?

A. Yes.

Q. That same impossibility is true of future criminal behavior as well as noncriminal behavior, is that right, doctor?

A. Of course, yes.

• • •

[351] Q. Is it possible to determine a given juvenile's potential for criminal behavior with let's say 50 percent accuracy?

A. Not for an individual because the individual is unique. All you can do is to say that this particular person fits this particular profile and that applies whether it's actuarial or clinical. Every individual has his own probability and can always prove you wrong when you make the prediction.

Q. In other words, once you have to make a decision about a given individual specifically, you never can be assured that you are making your judgment with any specific degree of accuracy, is that not correct?

A. Indeed that is so, yes, about the individual, but if we really behave that way we would never make any decision about anybody at all.

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[352] Q. In the given factual situation of that individual in the future?

A. From the point of view of the scientist, he [353] chooses which—in order to do his sums which base to use.

Q. If you could determine the future criminal behavior of an individual with let's say 50 percent accuracy, that would necessarily mean that you would be • • • right about your projection half the time and wrong half the time, isn't that so?

A. Yes. Actually I find it difficult to discuss individuals because really decisions aren't made in relation to people. Decisions are made in relation to information. It's the evidence that is on trial, in a sense, rather than the person, isn't it?

If you would say given that I only know this piece of information, what would it be rational for me to do—that I find would be easier to respond to, so I am not dealing with people, I am dealing with information.

You get me into philosophical speculation if you suggest that the person is different from the information because I don't know how we know anything about people except in terms of information that is transmitted to us by them.

• • •

[354] Q. If you take aggregate observations, let's say in a study, and you say that the model that you have developed is accurate 50 percent of the time and you have

individuals with related profiles, is it not true that statements about those profiles or the information in it will likewise be accurate 50 percent of the time and in error 50 percent of the time?

A. Yes, which you could achieve by tossing [355] pennies.

Q. If you say in error versus accurate 50 percent of the time, that's the same as essentially saying that half of the group will consist of false positives and false negatives and the other half of the group will be, I think as you said before, positive positives, right?

A. Yes.

Q. Assuming that you had at your disposal the most precise and individualized predictive model of juvenile—potential juvenile criminal behavior available to you that you could find in the current state of the art, would you still agree with your statement in the Borstal study that ["]even if individual prediction were possible by either statistical or ideographic techniques it would be useless for administrative purposes in a free country since individual prediction involves either omniscience of future chance happenings in the lad's life, which is out of the question, or it involves complete control over his life, which if not impossible is at least politically undesirable["]?

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[356] A. I'm not sure that's the chapter I wrote, but yes, I think I do by and large.

It seems to me that for the kinds of decisions that were being made at that time, and indeed now, [357] prediction alone is not enough. I suppose I had my own

really, to some extent, in the model which we developed for the United States Parole Board where prediction was a small element, but it didn't have to stand on those merits. It's largely the seriousness of the offense and the culpability of the offender and it just so happens that in the main those items which are predictive are, at least with adults, are also somewhat reprehensible.

I didn't want decisions made only on the basis of prediction at that time and I still would take that view.

Q. Do you mean by that that when an administrative agency [ ] implements laws or guidelines or when a legislature [ ] creates laws or guidelines relating to criminal justice [it] should take into account societal values or moral judgments about the nature of the behavior; is that what you mean by elements other than prediction?

A. Yes. Prediction merely gives you a number. It tells you what the risk is. It doesn't tell you about the distribution of that risk either.

You know, some people are poor gamblers and others are relatively rich gamblers and the strategies the poor gamblers can play are different from rich [358] gamblers, but they may still be playing the same probabilities.

So there are moral and ethical probabilities which have to be considered, particularly in terms of what assurance you want that you do not make an unacceptable decision.

I mean, as I say, if one is prepared to take the risk, then, of say locking up 20 for every one good one, you could perhaps have an impact on the rate of offending.

I can't tell you whether it is morally acceptable.

Q. In other words, the statistician may inform the administrator or the lawmaker about what the risk of error is?

A. Yes.

Q. The statistician does not inform the lawmaker or the decision-maker about what his value choice or moral choice should be?

A. Not in his role as an expert.

Q. Departing for the time being from the question of individuals and returning to the systematizing of information about individuals * * * once you begin to systematize [359] information, as a statistician you can, [ ] given appropriate study conditions, can you not, [ ] draw conclusions about the aggregate of the information, is that right?

A. And indeed of course subaggregates which become more useful.

Q. You can make generalizations, sometimes, and you can even establish relationships, can you not, between certain characteristics or variables and behaviors across the aggregate?

A. We can, yes.

Q. In fact, that's what statisticians do when they create models, do they not?

A. That's one of the things, yes.

Q. By the way, you can make these generalizations and relationships, again given appropriate study conditions, with respect to the behavioral characteristics of criminals or potential criminals, can you not?

A. Yes.

Q. How big does an aggregate or sample have to be before you can start making these generalizations or have confidence that the significance that you may find between variables and behaviors is an accurate reflection [360] of what's in fact going on?

A. Well, the sample size that is required is proportional to the difference that one is looking for so that a sample of, say, ten cases, and you find no particular differences in that group, and if it's a stratified or random—more depends on the method of selection than on sample size and sample size depends on the variability of the phenomena that you are investigating.

So if you have a highly variable phenomena you would require perhaps a larger sample size, but the size is not really relevant. Your inference depends on the—essentially on the method of drawing the sample in the first instance.

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[361] Q. One definition of recidivism is arrest of a person who has been previously arrested, is that not true?

A. That's one definition.

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Q. Recidivism rates for younger offenders are usually higher than recidivism rates for older offenders, is that not true?

A. It depends on really when they started rather [362] than their actual chronological age.

Q. [ ] The age of first incarceration is indeed highly correlated with recidivism, is that not true?

A. Yes.

Q. The younger you are when you first go to prison or to a detention institution, the more likely you are to be a recidivist in the future?

A. That is a predictive item in nearly every study that I have seen.

Q. You indicated in your direct examination that there were bases for let us say informed judgment as distinguished from actuarial accuracy. One can act on the basis of informed judgment in making decisions about criminal behavior, is that not correct?

A. One can. It depends on one's purpose which one chooses.

Q. It would be better, I take it, if one acted with actuarial accuracy than an the basis of informed judgment?

A. If one is basing one's decision on an essentially predictive statement, certainly. If one isn't, if one is dealing with culpability or seriousness of crime, then one is in an entirely different ballgame.

• • •

[363] Q. In fact, doctor, if you are called upon to make a decision about whether a juvenile is likely to commit a crime in the future, is one of the reliable bases for informed judgment that juvenile's prior criminal record?

A. It is one of the best predictors, yes.

Q. Well, doctor, I don't know that we need to use the word predictors. I am just interested in finding out whether or not you believe that the bases I suggest to you are reliable bases for the exercise of judgment.

A. Yes. Prior criminal record is certainly—I prefer that it was not handled by subjective judgment because I

don't know what weight may then be attached to it. I would prefer that this were established by [364] actuarial means.

Q. In other words, if you were a Judge and you had to make a disposition about the future criminal behavior of a child, you would look to prior criminal record, but you would want that weighted in some sense based on experiential standards, is that right?

A. I would prefer an actuarial summary of a large body of experience which would enable me to give more appropriate weights for the purposes of ascertaining the probable recidivism, but not, of course, for other purposes.

Q. You do agree, don't you, that the likelihood of a juvenile's committing a new offense increases with each successive offense he commits?

A. Yes. That applies pretty generally.

Q. By the way, within the recidivist group there is a group of more likely recidivators and less likely recidivators, is that not true?

A. Yes.

Q. The ones that are in the higher risk group, that is the more likely recidivators, are they more likely to recidivate early after release or earlier after release than the lower risk recidivators?

A. The findings haven's been very strong, but in [365] general it appears that the more likely a person is to recidivate at any time, the more likely they are to recidivate early.

Q. And the less likely they will recidivate later?

A. Yes. It's as though the two probabilities are not independent anyway, that the bad guys get into business somewhat sooner.

Q. Is another reliable basis for informed judgment about a juvenile's potential for criminal behavior whether or not he gets effective discipline and supervision in a supportive home context?

A. It is generally claimed that that is an indicator. I don't recall having identified that myself in the studies.

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[367] Q. It is true, is it not, that * * * one of the most reliable bases we have of informing ourselves about a delinquent profile is an examination of the home environment of the child, is that true?

[368] A. Not the most predictive.

Q. I said one of the most reliable bases for informing our judgment, if we do have to make a judgment about the potential delinquent behavior of an individual, is an examination of the home environment of the child?

A. I have no evidence that that is so myself.

I would assume the family is important. Many have claimed that it is, but I haven't actually worked with attempting to predict people who will be delinquent, [ ] who are not already delinquent[,] because I have a moral objection to that.

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[370] The Witness: May I offer, your Honor, an explanation? I would like to clarify the point, that I have never attempted to predict the likelihood of delinquency of children who have not received due process of law.

I take the view that children should not be sentenced by psychologists and on test scores. They have the rights to due process and for that reason

I have never got into the kind of work you [Ms. Gordon] were quoting [to] me of the Gluck's and one of the reasons I do not approve of the Gluck's work is on those grounds, that the prediction of potential delinquency is not a matter that I would get into—

Q. As a moral—

A. As a moral objection that even children have their rights to due process is my particular view there and I am willing to work with prediction of recidivism, but not of the likelihood of a person to commit the first crime.

Q. By the way, when you mentioned due process there, you are referring to the fact that a juvenile has already been adjudicated as a delinquent, is that what [371] you mean by due process?

A. I have dealt only with those who have been adjudicated in my experience.

* * *

[372] Q. Professor Wilkins, is instability of behavior in a juvenile, as illustrated, for example, by truancy, failure to report to home on a regular basis, failure to report to an after school job, if the child has an after school job, are those a realiable basis in any way for making an assessment about his potential for future delinquent behavior?

A. They are probably quite good data since they can be obtained fairly reliably, but that isn't the point necessarily, you see. You can get information overload.

In other words, if two things are highly associated with each other, you don't count both of them, although both may be extremely valid. So you have to look into the overlapping between these items. Otherwise, if you give each the

same weight, you are committing a very serious fallacy of inference.

Q. Is truancy highly associated with delinquent behavior?

A. It is so claimed. I have no data on that in my own studies.

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[373] Q. Doctor, I ask you again: Is truancy in your opinion a reliable basis for informing judgment about [374] potential juvenile delinquency?

A. I would not rely on it alone.

Q. Is it a basis?

A. It is possible.

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[376] *Redirect Examination by Mr. Guggenheim:*

Q. Professor Wilkins, you were asked on cross-examination whether or not a prior criminal record was a reliable factor to be taken into account in making a prediction. Are prior arrests reliable to take into account in predicting anything?

A. Arrest data with adults I know is usable, but you certainly don't need to use arrest data if one uses conviction data.

Q. You were also asked whether or not prior incarceration has a predictive quality in future criminal activity. Are there any studies to indicate that incarceration itself is causative of future criminal [377] activity?

A. Nothing that I find completely persuasive, but certainly there is fair evidence that the lesser time that people are detained, the less likelihood there is of their being re-

cidivist, but that is only within the range of penalties given. There is a natural experiment, if I recall, in Florida where people were released early. They were no more recidivist than those who were detained for full time. That is generally the finding.

[378] Q. * * * Let me give you a hypothetical based on some things you were asked on cross-examination.

Take a juvenile that comes before the Court with a previous record of a conviction who was presently truant from school and not getting along with a parent perfectly, the parent complains about their relationship to some degree, would you regard the prediction that that person would commit an act which would be a crime within the next month or two to be arbitrary?

* * *

[379] The Court: He must have been arrested and charged with some other offense, whatever that is, so give that offense if you wish to.

The Witness: Was the prior offense proven or not?

Q. First not.

A. It would be very dangerous to make any statements on the basis of that information. The false positives would be enormous, consider how many children play truant.

The Court: Well, I think the question asked was with a prediction that the child would be likely to commit a crime, would that be an arbitrary decision, I think that's what the question is. I gather that you have answered it differently but I think you can answer it specifically.

The Witness: I would say yes because obviously the base rate is the number of children who play

truant. With that as a base, the decision would be quite arbitrary.

Q. The same facts with the addition that a child had a previous conviction, would it still be arbitrary?

[380] A. It becomes slightly more predictive but the chances of being wrong are still very high.

Q. Your answer would be yes?

A. Well, yes, but a small yes.

The Court: * * * I want to be sure I understand. Am I to understand that your testimony is or is it your testimony that one can take data and you are comfortable in making predictions in terms of data about probabilities. In having that data and translating it to make a prediction about what an individual will do, am I to understand that you think at that point that the prediction is highly problematical?

The Witness: No, your Honor. I think it is quite safe to behave as though the probability attached to the individual in the light of there being no other evidence to go upon. One can only deal with the individual in the light of the evidence and part of the evidence would be that probability and since we cannot discriminate this individual from any other individual in [381] the same set, then all other things being equal, it would be ethical to deal with him in that way.

The Court: So that, let's say, people my age, background, so forth, it has been shown that 40 percent of them commit a crime and I come before the court and the court can predict that there is a

40 percent chance that I will commit a crime, is that what you are saying? Is that how you translate it to the individual?

The Witness: May I put it another way? If I were an employer and a person of a particular set of backgrounds appeared, then I would be advised in the pure efficiency sense to behave as though these people with these characteristics would be likely to commit a crime. But that doesn't mean to say that it would be an ethical consideration.

The Court: We are not talking about ethics at the present time. I am really trying to find whether —ethical or not—whether there is a basis for it being informed. The ethics, we will put aside for the moment.

Let's take what you call clinical and subjective and I think the only—my understanding is that the only way these matters can be done, that's before me, is a subjective or clinical decision. What do [382] the person or persons who are making it, is it required that those people have some kind of training and background in some area? What would you have them trained in, what kind of background would you have them trained in? Or can I just walk off the street and I get a job and I can do that? Is that the way we can go about it?

The Witness: I would prefer, your Honor, that one use both the actuarial and then reexamine the case as to whether there were any outstanding reasons as to why the actuarial was not applicable and that in those cases where the clinician sets aside the

actuarial, if he then gave his reasons, those reasons could then accumulate more information to improve the actuarial. That would be, for my mind, the best, most efficient way of doing it.

The Court: I know, you haven't answered my question. I may get to that.

I am talking about the qualifications of the predicter. I am trying to forget your reaction. What does the predicter have to have? What does he need in terms of training?

The Witness: Well, your Honor, all one needs is really good, sound data that is reliable.

The Court: That is if he uses the actuarial [383] and he takes the data.

The Witness: Yes, as long as it is reliable. By and large we find a very considerable amount of error in the case papers that we have examined so far.

The Court: What if he doesn't have the actuarial, does he have to make a judgment based upon his own instincts? What kind of training does he need? Does he or she? I am being very American now, I should take he or she. What kind of training does he need.

The Witness: There is really no evidence that training as such makes very much difference, unless it is training in the use of instruments. Psychologists, I suppose, are the main subjective assessors but they use quite a lot of materials of various kinds and the training is more in relation to the use of instruments than in handling the individual's own subjectivity.

The Court: So you think the psychologists or criminologists or penologists or whatever you are is no better, we are no better off than having someone with that kind of training than having someone do this who are just out of high school and have no particular training whatsoever?

The Witness: I would say it depends entirely on their ability to use the instruments in which they [384] could receive training. While the psychologist, since you cannot predict in advance what kind of cases he will see, he will have to have a fairly large kit of tests and materials. But where you can say this person is only going to make decisions of one kind, then his particular tool kit would be narrowed down and he can become as much an expert with his narrow tool kit as can the general practitioner with a very much larger tool kit.

I would think it is mainly the tools and the use of tools which are the basis of any expertise.

The Court: Thank you.

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Testimony of Lynwood David Zinn
(Excerpts)

[385] LYNWOOD DAVID ZINN, called as a witness by Petitioners, was duly sworn and testified as follows:

Direct Examination by Mr. Guggenheim:

Q. Dr. Zinn, would you state your profession?

A. Child psychiatrist.

Q. Could you indicate to the Court your [386] educational background, where you received your degrees and what degrees you hold?

A. I graduated from Washington and Lee with a bachelor's degree, studied at—did graduate work at the University of Michigan subsequently for three years and then went to medical school at the University of Virginia. I received my medical degree in 1968. Interned at the University of Wisconsin hospitals in Madison, Wisconsin, 68 to 69, then did a residency in general psychiatry at the University of Chicago from 1969 to 1971. Then I went to the University of Michigan where I had my child psychiatry training during the period 1971 to 73. At that point I joined the staff at University Hospital faculty of University of Michigan where I remained until 1977 when I moved to Chicago. Currently director of child psychiatry at Michael Reese Hospital, and clinical assistant professor at the University of Chicago.

Q. Do you possess any board certifications?

A. Yes, I'm certified in both general psychiatry and child psychiatry.

Q. And are you admitted to practice medicine or do you hold any licenses?

A. I'm licensed to practice medicine in Virginia, Michigan and Illinois.

[387] Do you have any previous employment relative to juvenile court practice?

A. Yes. I was a consultant to the Washtenaw County juvenile court.

Q. Where is that located?

A. In Washtenaw County, Michigan, the county that Ann Arbor is located in.

Q. When did you consult to that court?

A. I did evaluations for them over a period of a number of years. I was their chief consultant during '76 to '77.

Q. Do you belong to any professional organizations?

A. Yes, I do.

Q. Would you name a few?

A. The American Psychiatric Association, the Illinois Psychiatric Society, the American Academy of Child Psychiatry, the Chicago Council for Child Psychiatry, American Society for Adolescent Psychiatry and the Chicago Council of Adolescent Psychiatry and National Council on Crime and Delinquency.

Q. In your consultant work with the Washtenaw County juvenile court, what functions did you perform?

A. I would advise the courts on issues or [388] questions that they would give me. It ranged across a wide variety of topics.

Q. Did you interview with or treat any juveniles in that practice?

A. Yes. I didn't treat but I would evaluate juveniles at the request of the court and the probation department.

• • •

The Court: What does that mean? What does evaluate mean?

The Witness: I would be asked to interview a juvenile in the context of a particular question that would be raised by the courts, often having to do with the appropriateness of a particular kind of treatment. Frequently there would be difficulties with young people already in placement and they would ask my recommendation about different treatment plans.

• • •

Q. You indicated that your present position is as director of child and adolescent psychiatry at Michael Reese Hospital?

A. Yes, it is.

Q. What function do you perform in that capacity?

A. I'm responsible for the teaching programs and [389] the service programs in child psychiatry which include a child clinic, adolescent out-patient clinic, a consultation liaison program[ ] to the department of pediatrics, an adolescent in-patient treatment, a day treatment program and then there is a training program for child fellows, that is doctors in training to be child psychiatrists as well as a training program for general psychiatrists.

Q. At this time I show you this document [Petitioners' Exhibit 41 for identification] and ask you if you recognize it?

A. Yes, I do.

Q. What is it?

A. It is my curriculum vitae.

• • •

[393] Mr. Guggenheim: I would at this time move that Dr. Zinn be recognized as an expert in the field of child psychiatry and—that's all.

The Court: You mean child and adolescent?

Mr. Guggenheim: Child and adolescent psychiatry.

The Court: Any objection?

Ms. Miller: No objection, your Honor.

• • •

[394] Q. * * * There has been evidence in the record that there are juveniles who have never before been convicted of a crime, brought to court, arrested and charged with committing a crime who are detained pretrial and who are eventually released from custody without having been found guilty. The case was dismissed. What effect, if any, can that experience have on a juvenile?

• • •

[395] The Witness: * * * But the force of the question, if I understand it, is young people who have not committed a crime who are suspected of a crime who are detained because of that suspicion and then are subsequently found not guilty in the judiciary process—

The Court: Well, I think what you better do in order for that to be accurate, I think you better take out the first equation which is that they have not committed a crime. The charges are dismissed may not mean that they haven't committed a crime, but in any [396] event take the first equation out. The second one is that they are arrested on suspicion,

are held and detained and then the charges are dismissed. Then he is asking you—what's the question?

Q. What effect, if any, can that have on a juvenile?

A. Well, I think that the effect would depend upon whether the young person had in fact done the crime in question and if I can talk about both groups of young people, for a young person who has in fact committed the crime in question, I think it would leave him with a somewhat cynical attitude about the judicial process and the adequacy of its functioning in society. It would further, I think, fuel a certain amount of grandiosity that it is possible to beat the system.

For a young person who has not in fact committed the crime in question, I think that there are a couple of consequences which I would divide into two types of things. One having to do with the meaning of the experience. The second having to do with the actual consequences of the experience.

In terms of the meaning of the experience, for the early adolescent, the police and, as the early adolescent gets older, the judiciary are the foundations of moral order in the society and in effect [397] organizational social functioning. To be treated in a way that does not reflect their conduct, can leave them questioning the validity of that moral process.

Once these vicious cycles, as kids go through the system, and problems develop and the more the problems develop the more distrust develops in the young person and the less cooperative they are and the less they come to believe that the police and the courts do in fact responsibly reflect moral order.

The second effect that I would point to are the real consequences of separation from family and from community and as an aspect of community, the school.

I think here considerations of time are very important. While a few days to a few weeks may not be so important to an adult, to a young person, that time is infinitely longer having lived for a relatively shorter period of time.

Of course, in many school programs, it is very difficult to make up work and get back on target. Just parenthetically, I might add, that one of the studies that I was involved with in Ann Arbor during that first period, '61 to '64, was a survey of educational—or the role of educational failure in delinquency and there is fairly strong evidence of a pattern with delinquent young [398] people of falling behind in school, of suffering a blow to their self-esteem which makes it that much harder for them to function which pushes them that much more to the periphery of appropriate developmental activities and vicious cycles get set up accordingly.

• • •

[399] Q. Dr. Zinn, when we left off, you were describing the affects on juveniles who are detained pretrial whose case is ultimately dismissed in Court and are there any other effects that you haven't given already to the Court?

• • •

[401] The Witness: I don't recall talking about exposure to delinquent subcultures and the implications of that.

The Court: No, you did not. I can verify you didn't do that. That is something in addition and you may add to that.

The Witness: Well, there are a number of studies on the course of delinquents and adolescents that would suggest that the most important predictor of a future juvenile court appearance is a prior juvenile court appearance. The more the young person becomes involved with the court and with court placement, the more likely it will be that they will have subsequent court involvement. So one would add to the effects the possibility of directing the young person away from the mainstream of adolescent development and more in terms of a delinquent subgroup.

• • •

[402] Q. Is your answer substantially the same regarding the effects of the detention if a juvenile is detained in a [nonsecure] facility which is not characterized by restrictive objects such as bars on windows or locks on doors?

A. Well, it isn't the physical facility in and of itself that gives the quality of the incarceration or the detainment.

The Court: I think you ought to add entirely. I think it does give some substance to it. Not entirely. I won't accept a blanket statement that it isn't the [403] quality of the facility but you could say entirely and I will agree with it.

The Witness: Okay. Entirely. It is the relationship wtih people which [is] also important which is a way of saying that in theory one can have a physically more constraining environment with sym-

pathetic and [em]pathic people which might not be as traumatizing as a community facility where there were people who were brutal or harsh or dehumanizing.

* * *

Q. Have you seen the Petitioners' Exhibits 1 to 28-A in evidence?

A. Yes, I have.

Q. Do you have an opinion concerning the accuracy of the predictions in those exhibits that children would engage in criminal behavior?

A. I have an opinion, yes, that they would not be accurate.

Q. Why is that?

A. Well, it springs from a couple of sources. One is the way that I understand prediction in terms of my professional activities. The other has to do with [404] what I know generally about prediction of behavior. Should I elaborate on those two?

Q. Yes, please.

A. Well, prediction in my own professional activity has less to do with making a prediction about future behavior than it does making an assessment of the likely response of somebody to treatment. That is, as a medical professional, one attempts to diagnose a condition which on the basis of previous practice is treated in a certain way and on the basis of previous experience one can make certain statements about a likely response. It is not a prediction of behavior.

In the second sense, though, my understanding of difficulties with prediction of behavior would be very similar

to what Professor Wilkins said this morning, that the situations are always so complex that given our understanding at this point it is difficult to make any firm statements.

One thing that I think should be emphasized is that judging from the exhibits there seems to be a sense of dangerousness or risk residing in the individual. That is, one makes an assessment of the individual [and] on the basis of that makes a prediction about future difficulty. I think that leaves out an important part of the equation, [405] which is the situation.

I think all we know about delinquent acts is that it involves a vulnerable individual in a particular situation and I think it would be difficult to make a statement about future behavior unless one had rather detailed information about the situation that that individual was going to be in.

Q. Let me try to fill you in a little bit on some of that detail.

Assume that the recommendation which is read in court which is contained in the exhibits that you have read was based on an interview that took from 10 to 40 minutes, made by a probation officer who interviews with the child and a parent and perhaps a police officer or a complaining witness in addition.

What would your opinion be of the process and the probability of the prediction being accurate?

A. Well, I think it would take a child psychiatrist a much longer period to do an adequate evaluation of an individual and that individual's family and community environment. That strikes me as a pretty short period of time.

• • •

[406] Q. Do you have an opinion based on your experience as a consultant with a juvenile court of the efficacy of the use of an interviewing process which leads to a recommendation that a child be detained based on a prediction that if released the child would commit a crime?

A. * * * I was never asked to make that kind of statement. Were I asked, I wouldn't do it. I don't see that as within my expertise.

What I would be asked about is, once a decision had been made that a young person was coming under the jurisdiction of the court and the court was then in a position of placing the child, then I would make recommendations regarding what I thought to be suitable placements.

* * *

[407] Q. Are you familiar with the American Psychiatric Association's Task Force Study on Clinical Aspects of the Violent Individual?

A. Yes, I am.

* * *

[408] A. This is "Clinical Aspects of the Violent Individual," a task force report from the American Psychiatric Association done in 1974. Dangerousness, I can't find just quickly [ ] the definition of dangerousness that's specifically used but it refers in general to behavior which is harmful to either the individual or other persons or society. They emphasize, this is on page 26, that "dangerousness is neither a [409] psychiatric nor a medical diagnosis" and go on in the conclusions to state that "the clinician should not regard the prevention of future violence as within his proven capability."

It has been noted that "dangerousness is neither a psychiatric nor a medical diagnosis but involves issues of legal judgment and definition as well as of social policy. Psychiatric expertise and the prediction of dangerousness is not established and clinicians should avoid conclusory judgments in this regard."

Q. Is that report generally accepted in the field?

A. I believe it is.

• • •

[410] Q. Dr. Zinn, what in your opinion is the valid purpose of making an assessment of a juvenile who comes before the court accused of committing a crime?

A. To develop a treatment plan which more specifically is to make an assessment of what kind of interventions would be in the best interest of the young person involved and the probability of those interventions being successful.

Q. Why would, if it ever would, removal from a child's home be recommended?

• • •

[411] The Witness: Well, the usual reasons that a psychiatrist would make such recommendations, three occur to me offhand.

The first is that there are some egregious influences in the home from which the young person needs to be protected. I should say that as you all probably are aware there have been an increasingly conservative attitude toward this on the part of mental health officials, a reluctance to remove a person from his or [412] her home without a clear reason for doing so. More often than not that depends upon an evaluation of the actual home environment by

a social worker or court worker who has first-hand knowledge of what the problem is.

The second reason would be because of emotional illness a child needs protection or society needs protection from the child.

The third reason would be that treatment is required which can only safely be done in a hospital or a treatment environment.

As an example one might have a young person who deals with trouble and emotions by drinking. If you attempted to deal with that in the out-patient setting, every time the emotional issues were dealt with and the young person went out and got drunk and placed themselves at risk, the treatment would be counterproductive. One would want to have them in a protected environment where the behavior problems could be short-circuited.

• • •

[413] [*Cross-examination by Ms. Miller:*]

Q. Doctor, have you in the course of your psychiatric experience either had occasion to make a decision or to assist in making decisions as to whether particular juveniles should be admitted to or discharged from a psychiatric hospital?

A. Yes.

Q. You have?

A. Yes.

Q. Have any of the situations in which you made those determinations involved juveniles who were accused of violent crimes?

A. Yes.

Q. Have any of those decisions, admissions and discharges, involved juveniles who were accused of crimes that were not violent crimes?

A. Yes.

• • •

[414] Q. I would like you to assume that you have to make a decision about discharging a child, a 14 year-old child who has been accused of a violent crime.

When you come to that discharge determination about releasing that child back to his family into the community, do you give any consideration to the risk that he might commit future crimes?

A. Some, but not preeminent consideration.

Q. The child that committed a violent crime, do you give any consideration to whether he will commit another violent crime?

A. Yes.

Q. You do?

A. But again I emphasize that's not the preeminent consideration.

Q. But it is one of the considerations?

A. Yes.

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[415] Q. All right, doctor, I would like to turn this around and go to the other end of the procedure and put you in several hypotheticals. This would be on the intake or the emergency admissions side of the hospital. You

are working on this side of the hospital and you are informed that there is a [12] year-old brought in by the police who the police say was arrested while making a sniper attack on pedestrians from the roof of a building.

The police also have told you that it was [416] 12:00 at night and that the building where the child was taking the shots from is not his home. Several pedestrians were killed.

• • •

Q. The police have brought him to your hospital.

In deciding whether or not to keep this child—I would like to add one other factor, the child is totally uncommunicative. He says nothing. You only know his age because it was on a piece of paper that he carried that didn't tell his address and he is totally uncommunicative to the police.

In deciding whether or not to keep this child [417] or to send him away or to release him, would you give any consideration to whether or not this child would commit further violent acts if you released him?

• • •

[418] Q. You have to make the choice as to whether you are going to send him away with the police, release him, I assume, or keep him.

The Court: Or admit him for treatment.

Q. Or keep him before admitting him for treatment, your Honor. I think there possibly might be more than one step.

• • •

[419] A. Well, the simple answer, having nothing to do with the legal issues, is that you would want to do an evaluation in the emergency room.

Q. That's a period of observation before you admit him, is that correct? We assume at this point it would have to be—

A. We have already observed that the boy is uncommunicative, so the evaluation would consist of getting ahold of the parents and finding out what the situation is, the background to this.

Q. Would you do that before you admitted him?

A. Yes.

Q. So you would keep him for that period until you had determined that you were going to admit him?

A. Right.

• • •

[421] *By Ms. Miller:*

Q. Let me take another example, then. You are in the same situation. You are in the admissions room and a child is brought to you by the police. He is 12 years old and apparently they tell you that he shot his stepfather in the course of a family quarrel and it concerned the stepfather's treatment of his mother.

[422] Now, would you keep the child or would you release him?

• • •

[425] The Court: I guess the question she is trying to bring out is whether or not if the child is brought in, if the child doesn't want to be, being accused of that kind of crime, even if the child does not wish to stay, what would be your reaction being in the custody of the police; would you still keep the child in custody until you can make some kind of

determination? I think that is what she is trying to ask.

Ms. Miller: That's correct, that's exactly what I am asking.

• • •

[426] The Witness: On the face of the facts, would I recommend observation for treatment; is that what you are asking?

The Court: Yes.

Q. Yes.

A. The odds would be yes.

Q. And somebody makes that decision?

The Court: Somebody what?

Ms. Miller: He says he makes the recommendation.

The Court: That's all right. We will assume that the odds are that he assumed he will make that decision, yes. Let's not complicate it any further. It's complicated enough as it is.

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[427] *By Ms. Miller:*

• • •

Q. In treating a juvenile or in formulating the treatment that you are going to give a juvenile who has a pattern of criminal behavior, is one of the things you look to the family relationships, the family environment?

A. Is the family environment important in developing the treatment plan, is that the question?

Q. Yes.

[428] A. Yes.

Q. Do you look into the causes of the child's problem when you are formulating treatment?

A. Yes.

Q. Do you look to the [ ] family?

• • •

A. Yes.

Q. Similarly in formulating treatment, do you consider a juvenile's impulsiveness or his instability, and by that I mean his truancy or his failure to respond to adult authority, to be a factor in formulating his treatment?

A. Yes.

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[429] Q. All right, truancy, staying out late at night—

• • •

Q. Doesn't obey his parents, his guardian.

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A. What is the question again?

Q. Do you consider that in formulating, one, the treatment for a child who has a pattern of criminal behavior?

A. Oh, sure.

Q. And do you, secondly, look to it in looking to the causes of the child's pattern of criminal behavior?

• • •

[430] The Court: Is the truancy and the fact that the child doesn't obey his parents or guardians and so forth, is that related to the fact that the child

or juvenile is guilty of deviant or criminal behavior? That's what she is asking you.

• • •

The Witness: It strikes me as all part of the same process. I mean, one doesn't talk about aspects of somebody's behavior. If a child is truant and at the same time committing acts which are considered criminal, it's all the same thing. It's a behavior problem.

Q. In treating a child who has a criminal pattern of behavior, do you consider the number and the nature of his prior criminal acts in formulating his treatment?

A. I consider the pattern, yes.

Q. You don't consider the nature? In other words, if a child was brought to you accused of five rapes in the last five months, the fact that it was rape is not important?

A. Sure.

Q. It is important?

[431] A. But one considers everything. I mean, when you ask a question like that, any fact that was known about the child I would consider relevant.

Q. Do you think that prior criminal behavior is related to present criminal behavior?

A. Yes. I believe I already said that.

Q. Do you agree with the proposition that there are at least some juveniles who will continue to engage in criminal behavior until they are stopped by the intervention of some societal authority?

A. Yes.

• • •

[432] Q. Does the fact that the child has been found guilty of criminal acts change the course of your treatment?

The Court: Are you asking him if he started treating someone before they were charged with a crime and then they are charged with a crime and found guilty, if that fact alone would cause a modification of his treatment?

Ms. Miller: Yes.

• • •

A. Well, it would depend on what the criminal activity was.

You know, it occurs to me that perhaps you don't realize how common criminal activity is among young people these days.

The Court: Please, without that. The question is she is trying to ask you is would the fact that in the course of your treatment he is found guilty of a crime, whatever that crime is, would the fact of his being found guilty alone cause you to modify your [433] treatment?

The Witness: Not invariably. It would depend on the—

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Testimony of Hon. Cesar Quinones
(Excerpts)

[435] CESAR QUINONES, called as a witness by the [State, was] duly sworn [and] testified as follows:

Direct Examination by Ms. Gordon:

Q. What position do you hold?

A. I am a judge of the Family Court in New York City.

Q. How long have you been a judge?

A. Since August of 1970.

• • •

[436] Q. Have you spent any of that time, that is since August of 1970, in courts other than the Family Court?

A. Yes, I have.

Q. What courts were those?

A. I sat in the Criminal Court, New York City Criminal Court for 26 months. That was from January 1975 until the end of February of 1977.

Q. In what parts of the Criminal Court did you preside when you were there?

A. I sat in the youth parts, I sat in a jury trial part, all purpose parts and in the arraignment parts.

Q. Returning to your responsibilities with the Family Court, in what parts of the Family Court have you presided?

A. I have presided in all parts of the Family Court, including all purpose parts, the intake parts, foster care review, the child abuse parts, the designated felony part. I have sat in all the parts that comprise the Family Court in the City.

Q. You are familiar with Section 739 of the Family Court Act, are you not?

A. Yes, I am.

[437] Q. In what part of the Family Court are determinations under that statute made?

A. Usually those determinations are made in the intake part.

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Q. In any event, Judge, could you just briefly allocate your time, at least with reference to the intake part of the Family Court, between August of 1970 and December of 1974?

A. I would estimate that during those years I [438] used to sit in the intake part an average of possibly two or three months a year.

The Court: How long has that statute been on the books? It has been on the books since 1970?

Mr. Guggenheim: Since 1962.

Ms. Gordon: There have been some amendments, your Honor.

• • •

Q. From the time you came back to the Family Court after you were sitting on the Criminal Court in February of 1977, could you tell us or allocate for us the time you spent in the intake part?

A. Well, that would be a little difficult. I wasn't sitting in an intake part on a regular basis. It would be now and then: Perhaps in Kings County, in the Bronx, in Manhattan, so it was irregular, at least at the beginning.

[439] Q. How about in the current time period?

A. At current I am sitting in Kings County and there there are four judges that are rotating between the two

intake parts, that's intake A, intake B, part 4 and part 8, so I would be one of the four that goes in regular rotation into intake A at present.

The Court: How long has that been the practice?

The Witness: This system, with the four rotating, started, I would say, sometime in October of last year.

The Court: So you have been in the intake part in one form or another since that time, is that what you are saying?

The Witness: No, sir. We usually sit for periods of two months in the intake part. By the intake part I am talking about intake A, which is the part where the juvenile cases originate.

Then after a two month stay in intake A, I rotate to intake B for an additional two months.

From intake B I will go for an additional two months to part 4 and then from part 4, at least the present set up the way it is now, I will go into part 8.

So I would say that now I would be spending [440] two months out of every 8 months or something like that in intake. I would imagine that is it.

The Court: I think that covers it.

By Ms. Gordon:

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Q. By the way, what is part 4? What does one do there?

A. Part 4 is the part designated as the designated felony part.

Q. Is that for the trial of designated felonies?

A. It is.

Q. Would you please briefly describe your professional experience prior to becoming a judge.

A. Immediately prior to being appointed I was secretary to a Supreme Court justice in Kings County, that is Justice Thomas H. Cullen. That was from January 1969 until August 1970 when I was appointed to the bench.

Prior to that time I was in private practice as a partner in the firm of Erazo and Quinones and—well, I guess that would be it.

[441] Q. What was the nature of your practice with Erazo and Quinones, if there was any specialty or subspecialty to that practice?

A. It was a general practice. It started out as a neighborhood practice and my particular specialty was court work. In other words, I did most of the court appearances and quite a bit of it was in criminal law.

Q. Did you have any relationship with the Bedford Stuyvesant Community Legal Services Corporation?

A. Yes. I was chairman of the board of the Bedford Stuyvesant Community Legal Services Corporation during 1969-1970. Prior to that I was on the board of directors.

[442] Q. Could you just briefly tell us the principal organizations to which you belong and the positions which you hold with them, if any?

• • •

A. I am treasurer of the New York City Family Court Judges' Association, I'm a member of the board of directors of the Medgar Evers College Community Council. I am on the board of directors of the Mercy Home for Children. I'm on the board of directors of the Brooklyn Men-

tal Health Association. I'm on the board of the Manhattan Community College. There are others, other community organizations but right now I can't think of them.

Q. Judge, I show you Section 739 of the Family Court Act which is in the current McKinney's volume and I show you also the pocket part of that volume so that we have the complete statute. I'm sorry to make it a little inconvenient for you.

Judge, I direct your attention to subdivision [a] and sub [i] and sub [ii], and ask you whether or not you have an opinion as to whether there are juveniles who [443] appear in the intake part of the Family Court who come within subdivision [a][ii] of the statute, that is, serious risk of a crime before the return date, who do not come within subdivision [a][i] of the statute?

• • •

A. Yes.

Q. What is your opinion?

[444] A. I feel that there are such type of children that would fall under the second category and not necessarily under the first.

Q. Would you tell us or give us an illustration of what type of child that might be that comes within [a][ii] but not under [a][i]?

A. I think that the most clear example would be a youngster who has had many contacts with the court, who has appeared in court on each of the prior contacts so that there is really no question as to whether he would return to court or not, but that because of the numbers, the sheer numbers of contacts that he has had with the court or perhaps with the number of prior findings that you have had, although he returns to court, the court or judge might feel

if released this youngster would pose a grave risk of committing another crime pending the next court appearance.

Q. Judge, turning, if we may, to the actual circumstances in which you, sitting at intake, consider whether or not to release or detain a juvenile, I would like to know what papers, if any, must be before you when you are going to make a determination under 739?

A. Well, the first thing, obviously must be a valid petition.

[445] Q. Would you just tell us briefly what the petition sets forth, just in summary fashion, if you can?

A. Well, it sets forth the essential elements. In other words, the name of the respondent, his age, the age is necessary because we wouldn't have jurisdiction unless he were under the age of 16.

* * *

Q. Before you make a determination under 739 and assuming you have before you the just the accusatory instrument as you indicated, made out upon information and belief, do you have to have any other information in support of the charge contained in the petition before you come to consider the 739 issue?

[446] A. If the information or rather if the accusatory instrument is on information and belief, I don't believe that that would be sufficient to give us jurisdiction. It must be supported.

Q. What does that mean, Judge, what does it have to be supported by?

A. Well, either a supporting affidavit from somebody who does have direct knowledge who indicates that they had read the petition and that the petition is true. I don't

believe that it can be based merely on information and belief.

Q. When you say a person with direct knowledge, is that a person with direct knowledge of the acts which are alleged to constitute the crime?

A. Yes.

> The Court: Well, let me ask you. That could be either a witness or the victim, is that correct?
>
> The Witness: A witness or the victim, precisely, yes.

Q. If you don't have the written statement of the witness or the victim, can you have the presence of the witness or the victim in your courtroom?

> The Court: If he doesn't have what?
>
> Ms. Gordon: If he doesn't have the written [447] statement of the witness or the victim, can the written statement be excused, as it were, if you have the presence of the complaining witness in your courtroom at the 739 proceeding?

A. I don't see how that would happen, because if you had their presence, you would have the person sign the petition itself. I don't see how that would happen.

Q. Who, if anyone, must be before you in the courtroom when you consider the release-detention determination under 739? What individuals must be before you?

A. Well, we have the respondent, of course.

Q. That's the juvenile?

A. Yes. The respondent is represented by counsel, so if he doesn't have counsel when he comes in, then the court

will determine and before anything further happens, counsel will be appointed for the respondent. The Corporation Counsel or the assistant district attorney, depending on the petition, is usually present. You have a court liaison officer that is a representative of the probation department or at times you can have the intake probation officer himself or if the respondent has prior contacts with the court, perhaps his individual probation officer might be present.

[448] Q. What about an adult who is responsible for the child, do they have to be present or are they normally present?

A. It is desirable if they are present and we would try or at any rate, as often as possible, to have either a parent or somebody representing the parent present. There are times that it is impossible for one reason or other and at that time perhaps a guardian ad litem might be appointed in place of the parent at least for that day's purpose or at times perhaps the attorney might waive the presence of the parent for that purpose.

The Court: Have you listed for us all the people that you require to be present, which, as I understand it, is the juvenile and his counsel and the city prosecutors' arm in one form or another and the Court liaison officer, are those the essentials?

The Witness: I believe those are the essentials. There might be some additional personnel but those are usually the ones that are usually present.

The Court: You can proceed with those persons present and no others?

The Witness: That is correct.

The Court: There may be others present?

The Witness: There may be others there but at [449] least that [many].

Q. What is the function of the probation liaison officer or the child's own probation officer, if that happens to be the case, at the proceeding? What does he or she do?

A. The purpose of the court liaison officer is to give the court some information concerning the respondent, either with reference to past history, past contact with the court, some information about the home situation, the school situation and based on this information which either the intake probation or the regular probation officer gathers, either from interviewing the respondent beforehand or interviewing the parent or any other persons that are germane and based on that information, the court liaison officer will make a recommendation to the court with references to either remanding the youngster or paroling the youngster.

Q. By the way, if the probation officer simply makes the recommendation, says, remand or parole and that's all the probation officer says, may the judge inquire of the probation officer as to the basis for the recommendation?

A. Oh, definitely.

Q. By the way, just so we get our terminology [450] straight. Parole and release are synonymous terms, is that correct?

A. That is correct, yes.

The Court: It has been brought out in prior proceedings in this case that the court liaison officer is present in the courtroom and is not the probation

officer who actually has done the interviewing with the parents and so forth, that some other probation officer does that and sends onto him the recommendation and he in turn tells the judge what this officer recommends, is that correct?

The Witness: That is correct, your Honor, that is usually the case.

Q. What is the function of the juvenile's attorney in the proceedings before you or what does he usually do?

A. Well, he is representing the juvenile and I would say that his function is the function of any defense attorney, to do the best he can for his client. He questions the validity of the petition, he makes the necessary motions, if he feels that the petition is insufficient. He will argue in favor of releasing the youngster. He will bring forth the more favorable aspects of the situation.

[451] In other words, he is acting as a defense attorney.

The Court: I have the impression from the way this is described that counsel and the City and the court liaison officer are in fact before you or before the judge and are making representations and that nobody goes on the witness stand and makes representations?

The Witness: No, sir, they are not on the witness stand. It is all part of the proceeding.

The Court: They are all before you and the court liaison officer will tell you what he feels and counsel will argue on behalf of the juvenile and the

City or the prosecuting arm will present their views to you? Is that correct?

The Witness: Well, I don't think that you will find the Corporation Counsel too often saying anything. Occasionally if they feel that you have some extraordinary circumstances, perhaps they might also recommend or make a recommendation. But most of the time the recommendation comes from the court liaison officer.

Q. In the course of this proceeding does the juvenile have the right to remain silent?

A. Yes.

Q. Is a plea entered on behalf of the child [452] either at this proceeding or at some prior proceeding if this is not the first one and does the child have to admit or deny the charges or someone on his behalf have to admit or deny the charges?

A. Well, a plea is usually entered and it is usually a denial.

Q. If an adult, the responsible adult is in court on behalf of the child, what is that adult's usual role or function, how does he participate, if at all?

A. The adult represents the person in charge of the welfare of the youngster. It is a parent or an older sibling or a member of the family, an adult member of the family, or perhaps a neighbor who appears in place of the parent who can't appear and the role is one of—usually supportive, is there in support of the youngster. The adult is interviewed by the probation officer and the adult is allowed to say something, if the adult wishes to address the court.

Q. May the court address the adult if the court so chooses?

A. Yes.

> The Court: What do you mean by "may the court address the adult"? The court is in charge and the court can do anything he wants to in his own courtroom.

* * *

[453] Q. Judge, could you just tell us if the court does inquire of the adult who is there, what is the usual nature of that inquiry. In other words, what does it relate to?

A. It usually relates to the behavior of the youngster at home, the relationship between the parent and the youngster, because when you parole a youngster, it usually is in the custody of the adult and the court wants to find out as much as possible about the youngster and that's one way to do it. You ask the parent's opinion. After all, the parent should know the child better than most people.

Q. * * * I ask you whether or not it is possible for a juvenile to call witnesses on his behalf at these proceedings?

A. It is not the usual situation but occasionally [454] there are people who accompany the youngster to court. This might be a clergyman or some social worker who has been working with him in the community. It could be an interested relative and occasionally they are accompanied by these type of people, yes.

> The Court: What happens? In those situations if they want to make statements, it is allowed?
>
> The Witness: Yes, it can be allowed, yes, definitely.

The Court: I know it can be. I am not asking that.

The Witness: Is it allowed?

The Court: Is it generally allowed?

The Witness: Generally, yes. Personally, I feel if somebody takes the time and interest to come to court, then certainly the least I can do is allow them to give me the benefit of whatever they have to say.

The Court: That's what I wanted to find out.

Q. Judge, for what purpose are those witnesses that you would hear be brought when they do appear? What do they testify to?

A. Usually they are brought in a supportive role, supporting the youngster. In other words, it is usually to present the youngster in as positive a light as can be. [455] Something to induce the court or maybe persuade the court that the youngster can be released.

Q. Do the children who appear before you in these proceedings appear in handcuffs or restraints if they are coming from Spofford and for that reason, that is coming from Spofford?

A. No, it would have to be a really extraordinary situation for a youngster to appear before the judge in handcuffs.

• • •

Ms. Gordon: My question is how do they appear before the judge.

The Witness: I do know they use cuffs to transport them in the halls and other places like that.

• • •

[456] The Witness: Not in the courtroom. Except, again, unless you have a really unusual circum-

stance where the youngster is said to be extremely violent or for something like that. It would have to be an extraordinary situation.

* * *

[457] Q. Is the proceeding before you under 739 akin to the proceedings that you sat on in the arraignment part in the criminal court of the City of New York?

A. Yes, they are very similar.

Q. Are there any salient differences that you are aware of other than the fact that one results in bail most often and this results in detention or release?

A. Well, that is the biggest difference and, of course, we have the other difference which is that there is no preventative detention provision in the criminal court.

Q. In other words, the nature of the determination may be different?

A. Yes. But outside of that they are very similar.

Q. Judge Quinones, turning back to the statute, I call your attention to both subdivisions [a][i] and [a][ii] of the statute and note that they refer to events that occur on or before the return date. What does the term return date mean as it is used in that statute?

A. Return date to me means the next scheduled appearance of the matter before a judge.

Q. In a juvenile delinquency proceeding, what is [458] usually the next proceeding that occurs on the return date after the 739 determination?

A. The next appearance would be for a fact finding hearing.

Q. By the way, is that the adjudicatory phase of the juvenile delinquency proceeding?

A. Precisely, the fact finding.

Q. Now, in the ordinary course, what is the amount of time between the date a determination under 739 is made and the commencement of fact finding or the next return day?

A. Well, there are several factors that had to be taken into consideration there. First, the availability of witnesses, the preparation that might be needed by both sides, the Corporation Counsel, the district attorney or the attorney representing the respondent, so depending upon the complexity of the case, depending upon the court calendar, it could be anywhere from several days to several weeks.

Q. Do you have any knowledge of approximately what the current time lapse is between a 739 determination and the commencement of fact finding in Kings County?

A. No, I don't, but I do know that we have a [459] limit, in other words, we have a 90 day period within which we are supposed to reach fact finding from the time the case is drawn, we are supposed to have fact finding within 90 days of that time.

The Court: From the time of what, judge?

The Witness: From the time the petition is first brought into court.

The Court: From the petition to the fact finding, 90 days?

The Witness: That's right.

• • •

Q. Judge Quinones, could you address yourself to that interval [between the time petition is drawn and the 739 hearing]?

A. The drawing of the petition and the appearance [460] in intake is usually simultaneous. It is usually the same day or perhaps the day after, but it is usually simultaneous.

Q. Does the judge who is making the determination under 739 also set up the next calendar date?

A. That is correct, yes.

Q. So it is he who determines when the fact finding proceeding, if that's the next proceeding, is likely to take place?

A. That is correct.

* * *

The Court: I want to be sure that I am right on this.

In Kings County you have to make a fact finding determination within 90 days of the filing of the petition, is that correct, or is it fact finding hearing?

The Witness: You are supposed to arrive at fact finding. You are supposed to have a fact finding hearing within the 90 day period. There are exceptions to it but those are the guidelines.

* * *

The Court: You are supposed to make a fact [461] finding?

The Witness: Yes, within 90 days. That is the guideline. Those are the guidelines.

The Court: I think I can use the word determination.

The Witness: Yes.

• • •

Q. What effect, if any, does an order of detention under 739 have on the setting of the return date of the next proceeding or on the 90 days, if you prefer?

A. If a youngster is detained under 739, then you must put it down for a probable cause hearing within 72 hours, so you have a maximum of 72 hours before the case comes back to court again, that's the maximum. It could be less but that's the outside.

Q. Assuming that you have a probable cause hearing, are there other time frames in the statute which take over in terms of the commencement of fact finding?

A. Yes, there are, depending if the respondent is still in detention. In other words, if he was still detained after the probable cause hearing, then there are limits as to how long you can keep the youngster in detention before a fact finding hearing is held.

[462] Q. I show you just informationally, section 747 of the Family Court Act and section 748 of the Family Court Act and ask you whether or not those are the statutes which set forth the timeframe in which fact finding is to begin for children who are detained?

A. Yes, I believe those are the statutes, yes.

The Court: Well, Judge Quinones, I took down, I thought you said, that after a 739 hearing that fact finding can occur within several days or several weeks?

The Witness: It can, yes.

The Court: Now, then you said it has to occur within 72 hours?

The Witness: No, your Honor. Only if the youngster has been detained, if he is in detention. If he is paroled, if he is released under 739, then the period can be flexible.

* * *

Q. When you make a determination under 739 about events that may occur on or before the next return date, do you look to the ordinary course period which you indicated was up to 90 days, possibly, or do you look to [463] the telescoped periods that are provided with respect to detention?

A. I look to the ordinary, to the ordinary adjourned date. In other words, the date that usually comprises of several weeks. That is the period that I am usually concerned with.

Q. In order to come to a decision under 739 about whether or not there is a serious risk that the juvenile before you may commit another crime, before the return date, what aspects of the case do you look at?

A. Well, first we look at the allegations in the petition. At least I. I won't say we. I consider the past record of the respondent, if any. I consider the report and recommendation given by the CLO, that is the Court liaison officer who is representing the probation department. I consider any statements or other facts brought out by the attorney representing the respondent and any other facts and circumstances that I feel would help to make what I hope will be the right decision.

Q. Information about the home, is that normally available to you and, if it is, in what form is it available?

A. Information about the home can be obtained from interviewing the parent, if the parent is present. [464] It can be obtained from a probation officer if the youngster does have one. The court might be able to find that information by questioning the persons who are present.

Q. If you have information about the child's progress in school or lack of progress in school, do you consider that also?

A. Yes, the school situation is also considered.

Q. Is the school information usually available at the time you make your 739 determination?

A. Usually not unless we have a prior history with the youngster and that school information might be part of the probation report.

Q. Do you know whether or not that at least as to the nature of the allegations, the past record, if any, the probation report and such information as you are able to obtain about the home or the school, do you know whether or not those areas of the case are commonly considered by your colleagues on the Family Court bench?

A. Yes, I think they are.

Q. On what basis do you conclude that you think that those aspects of the case are common for consideration?

A. We talk with each other quite often. We have [465] lunch with each other very often and we express our ideas, our opinions and different matters that have appeared before us. It is a conclusion that I have reached from talking with my colleagues.

Q. Now, with respect to the aspects of the case that you mentioned, can you illustrate what about them that you look at in coming to a conclusion as to whether or not to release or detain? For example, what about the nature of the current charge is material to you?

A. I guess we all have our standards and we all have means of determining in our own minds the seriousness of allegations. For me, I categorize cases into two categories, two general categories. That is, allegations concerning acts against a person, acts of violence or acts that threaten harm to a person and then we have the allegations of acts against property. And as far as I am concerned, I think that the acts against person, acts of violence, are more serious, in general, than acts against property.

Q. So you look to the seriousness of the charges?

A. Yes, definitely. I look to the seriousness of the charge. I look to see whether anybody was hurt. I try to evaluate how strong the case is, in other words, what the probability is that the allegations will be [466] proven against the respondent. There are some cases that are stronger than others. And, if possible, I try to ascertain whether there were any injuries, the age of the complainant, the victim, I try to find as much about the situation as I possibly can.

Q. Do you look to the manner in which the acts alleged were performed or to the mental state, shall we say, of the child as best you can determine it from what's before you?

A. I believe that the nature of the allegations by themselves would tend to—what's the word—well, you might say that the nature itself might indicate a wanton disregard on the part of the youngster, either for the safety of an-

other or for the—if not only safety of the person, but also wanton disregard for somebody else's property. That is in that respect. If he or she has that little control with reference to the act here that might be indicative that the same lack of control could conceivably lead him to commit another act.

Q. Is the time of the day or night that the offense is committed, is that relevant to your consideration?

A. Yes.

Q. How and why is that relevant?

[467] A. Depending on the allegations, certain acts might be more harmful, might actually—what is the word—might indicate a bigger threat to society than others depending upon what happened with it.

If you set a fire at night, for example, it might be more dangerous than during the daytime conceivably when people are awake.

If you do something to somebody at night, perhaps the person might not get help quite as quickly as they might during the day when others might be around. That's just one passing situation. The time by itself may not necessarily be important, but it could be depending upon the circumstances.

[468] Q. Does the time that a juvenile is alleged to have committed an offense have any relationship to how he is doing in his home environment?

A. Well, it would seem to me that if somebody was accused of committing some act at 4:30 in the morning, it might show, number one, that there isn't sufficient parental control because I believe that that is a time when most youngsters should be expected to be at home in bed. So

that might be an indication of either lack of parental control or else of defiance on the part of the youngster with reference to the parental restraints.

Q. Let's turn to your examination or consideration of the prior record. What is material with respect to a child that has a prior record, if anything, in forming your judgment under Section 739?

A. What does the record consist of? What has he been accused of in the past? What kind of findings, if any, do you have in the past? What relationship does the past record have to do with the current allegations? Is it a similar type of allegations to those that he or she had in the past? It might show a pattern.

Q. Is the proximity or closeness in time of the past charges and the current charge of any relevance?

A. Oh, definitely so.

[469] Q. What relevance does it have?

A. If the past record indicates that the youngster has been continuously in a recent period been getting into trouble, that would be of more relevance with reference to 739 than if the last contact with the court had been several years, because it would show that—it shows a recent pattern of behavior on the youngster's part.

Q. Judge Quinones, I show you [Petitioners'] Exhibit 14-A, which is the transcript of a proceeding on July 5, 1978 in the Matter of James Peebles, held before you and I show you 14-B, Petitioners' 14-B, which is the petition of delinquency accompanying that proceeding and signed by, although it is somewhat unclear, one Francis Harrison.

Would you just look through those documents for a moment, Judge.

• • •

[473] Q. Judge, at the time you made this remand [of Peebles], was it within the capacity of a Family Court judge to remand a child to detention so that that child might get social [474] services or psychiatric services that he might not get at home if he were left in the community?

A. No.

> The Court: The answer is no?
>
> The Witness: No. No. I wouldn't be putting anybody to help him with something else. Very rarely.

Q. Does a Family Court judge have that capacity now; in other words, to put a child in detention so that he might get some social service or psychiatric service that he wouldn't get in the community?

A. Well, yes, but not this type of detention. The detention might be of another type.

Q. 739?

A. Under 739, no, I don't think so. That's not the purpose of 739.

Q. I call your attention, as I said, to page 5 of the transcript [Petitioners' Exhibit 14B] wherein you note "The mother herself thinks this boy needs help."

Could you tell us what you meant when you said, "This boy needs help"?

* * *

A. I am sure that—and this is from my own way of acting. I am sure I did not remand that youngster for [475] his own good, in other words, to help him. He might need help, but this remand was not for that help, not at that particular time, no. When I said he needs help, it

might be that based on what the mother had said, based on the allegations in the petition that he definitely would need help to help him out in the future, but it didn't mean that he was being remanded to get any immediate help, no.

• • •

[476] Q. Judge Quinones, when you remanded James [477] Peebles, did you believe that there was a serious risk that if released he would commit another crime?

A. Yes, I did.

Q. When you listed the aspects of the case that you looked to before for us and the illustrations, is it your opinion that any one aspect is controlling, such as prior record, or is it an amalgam of events that you looked to?

A. It's the whole picture. It is all the factors together, not any one factor alone.

Q. Do you have an opinion as to whether or not Section 739(a)(ii) can be appropriately applied to a child who has no prior criminal record?

A. Yes. Under certain circumstances, yes.

• • •

[479] Q. Judge, what is your opinion of the purpose of the detention that Section 739(a) [ii] authorizes?

• • •

A. I believe that the purpose of 739(a) is really the protection of the community. I believe that's the basic purpose for that provision.

Q. If that statute serves the interest of the child at all, in what sense does it serve the child's interest, if you have an opinion?

A. If it serves the child's interests at all, it would be the minimal benefit that while he is in detention, he is not

committing another crime; if that can be called a benefit to the youngster, but I don't believe that detention is actually for the benefit of the youngster, not under this statute.

I certainly would not remand anybody for benefit. Perhaps you might find a rare case where somebody might be so favorably or so shockingly affected by a short stay in Juvenile Center that that might turn [480] him around, but I don't believe that is the purpose he is put there, no. You don't put them in for their own good, I'm sorry.

Q. Are there any disadvantages or bad effects from the detention or the pretrial detention of a juvenile in your opinion?

A. Yes.

Q. What are they?

A. In my opinion, all [detentions], juvenile or adult, can have bad effects. For one thing, we are talking about youngsters of tender age. You are taking them away from their family. I mean, that's bound to have a psychological deterrent—not deterrent, detrimental effect on them.

Then again, Juvenile Center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they, possibly might be, and it might have a bad effect in that respect.

In other words, there is—any sort of [481] detention, as far as I am concerned, can have a bad effect, and this is something that can only be done—

Q. Can it have a good effect?

A. It might. It might, but again the effect might be that somebody might realize if I don't mend my ways I am liable to wind up in these situations more and more as I get along. It might be that. It might have the shock effect.

The Court: I don't know whether you are now, but you have spent two months in the intake part. How many of these matters do you have on the average of a day?

The Witness: Well, Judge, again, only using the figures that I got from the clerk, if you average last year's figures into the number of working days, the juvenile petitions add up to an average of about 30 a day, according to these figures. If we use these figures it might be about 30 a day.

The Court: When you are in the intake part you deal with this from, what, 9 or 10 in the morning until what time?

The Witness: Yes.

The Court: Till what time?

The Witness: 9:30 to 5, that's the usual day.

The Court: So you figure maybe you average [482] about 30 of these a day in the intake part?

The Witness: If these figures are correct and if we divide them by the number of working days, that's what I go by. I mean, some days more, some days less, but the average might be about 30.

By Ms. Gordon:

Q. Judge, from your experience in the criminal court of the City of New York in the arraignment part, approximately how long does an arraignment take?

A. The usual arraignment takes only a few minutes, the usual one. It's very cut and dried, in and out. If you have unusual circumstances, of course, it might take longer, but the usual arraignment is fast.

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[484] *Cross-examination by Mr. Guggenheim:*

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[485] Q. In your opinion, do your colleagues utilize the identical standards that you do in making a decision to parole or remand?

A. I don't know whether they use the identical standards. I know that they use the basic standards that I outlined before.

Q. Would you regard these standards as subjective?

A. The standards?

Q. Yes.

A. No, I don't believe the standards are subjective. Possibly it might be subjective in applying the situation to the standards or trying to fit the facts presented to the standards. That might be subjective, but the standards themselves are not, no.

Q. Is it your opinion that the standards are applied in a subjective manner on occasion?

A. Yes. I believe so, yes. I believe at all times it has to be subjective.

• • •

[486] Q. Is it your opinion that race is ever taken into account in making a decision to parole or remand by certain judges?

A. I know of no judge that takes that into account, or at least if they do, they have never told it to me, let's put it that way.

Q. Do you know if certain judges take into account [in] the decision to parole or remand the fear on the judge's part that the child will commit another crime which will then be reflected in a newspaper account, perhaps, that the judge released somebody who has committed a crime?

A. I think that judges are human beings just like anybody else and I believe that one of the factors that does influence some judges is the newspapers and the articles in the newspapers. Yes, I believe that that could be one of the considerations.

Q. You indicated in your answers in your direct examination that the operative period of time within which you are making the prediction that the child will [487] engage in criminal conduct is not the three or six days that the child may spend in detention, but is the several weeks leading up to the trial itself. Is that right?

A. That is correct.

Q. Is it your opinion that you are able to refine your ability to make that prediction down to a closer end; that is to say if the child were held within only five days you would be more likely to release than if it were to be held in five weeks where there would be a longer period of time within which it [is] possible that the child would engage in criminal conduct?

A. Well, sir, I will answer you this way: In cases where there is a serious doubt in my mind, in the cases where I feel that the youngster might commit another crime, what I will try to do in those cases, in those very close cases, I will try to give as short a date as possible.

For example, I might try to put the case on within a week, within five days to try to minimize that situation, and at the same time not have to remand the youngster during that period. I will try to cut down the period if I think that that is the case.

So definitely the time factor is one of the things that I keep in mind.

[488] Q. Do you hold any degree other than a law degree and a baccalaureate degree? Do you hold a baccalaureate degree?

A. Yes.

• • •

Q. What was your major in your undergraduate work?

A. Sociology.

• • •

Q. You have made a prediction that a child will engage in future conduct even in cases where a child has never before been arrested except for the act that has brought him before you at that time, is that correct?

A. That is right.

Q. You make that prediction in order to protect the community from his getting into further difficulty and committing crime, is that right?

A. That is correct, yes.

Q. Let me ask you a question that I have thought about for a long time in this area. If the case comes to trial and

is ultimately dismissed, why is the juvenile [489] then released?

A. Because we have no legal reason to hold him because he has been found innocent.

Q. Does it change your your assessment that you made earlier that he is dangerous to the community?

A. It would have to.

Q. It does?

A. No, that's not the answer. In some cases perhaps you might still think that the youngster is dangerous, but for whatever reason, either he has been found innocent or he has been released, but [it does] not necessarily follow[ ], that because he is found innocent that he is not dangerous. Not necessarily so.

• • •

Q. Let's assume a case in which a juvenile comes into court for the first time, never before been arrested, [490] is arraigned, the Judge makes the decision that the child is likely to commit another crime, the charge is robbery, comes on to trial and the Judge, after a hearing at which the eyewitness testifies "I have made a mistake in this case. The juvenile involved before the Court did not commit the crime. I'm sorry."

Would that have any bearing on your initial assessment that the child was dangerous to the community?

A. Well, this is beautiful hindsight. I have to make the decision before we have those facts.

Q. Is the answer yes? Would it change your assessment?

A. If he hadn't committed the crime at all?

Q. Yes.

A. Of course.

Q. Is it true that part of what you consider on the likelihood to commit a crime, that the person committed the crime that brought him to court?

A. I said that one of the things that I consider is the probability or the strength of the case against the respondent, yes. If I can try to ascertain that, yes.

Q. If you can try to ascertain that—

A. Yes. And there are ways to do that.

Q. You can't always do that, can you?

[491] A. Of course not, no. You can't predict, no, not at all.

Q. In fact, with the utilization of the police liaison officer in Kings County, isn't it true that in the vast majority of cases which come into intake, no person is before the Court with direct personal knowledge of the underlying charges?

A. I don't know about the vast majority, but certainly a large number of the cases fall into that category.

• • •

Q. In those cases in which no person with personal knowledge is before the court, isn't it the fact that of those cases, many of the time the court does not even see or personally read the supporting affidavits?

[492] A. Yes. That's possible. But then the supporting affidavit doesn't give much information most of the time, either.

The Court: You are getting [me] a little confused now. I had understood that the supporting

affidavit, at least somebody who indicated knowledge of the crime, was essential to a 739 proceeding.

The Witness: Well, Judge, actually I believe—I don't know how right this is. I don't believe that you can draw or you can have a valid petition before you if it is based merely on information and belief.

In other words, the supporting affidavit is usually a pro forma affidavit that says that the person who does have actual knowledge has read the [petition] and attested to the truth of it. That's what I am saying. Usually it [the affidavit] doesn't give much additional information. It's only one affidavit asserting as to the truth of allegations drawn by some other person.

Q. Would you ever detain a child who has never before been convicted of a crime, who is before the court on a property offenses in the second category of your own definition, based on a belief that if released the child would engage in further criminal conduct?

A. On a property crime? Yes, that is possible [493] also. It is not usual. I don't think I would usually do it, but I can see where a situation would come up where it would be possible.

* * *

[497] Q. Under the circumstances would you detain a juvenile who has never before been convicted of anything, who is accused of a property crime only?

A. That's a very difficult question to answer. It would depend on the facts as brought forth. In other words, are

you asking me can I conceive of any situation where I would remand somebody on a property crime merely because this was the first time?

Q. Yes. You have already answered the question yes. Now I am asking you under what circumstances you would do it.

A. Every case has to be decided on its own merits. It could be based on information in the probation report, it could be based on many things.

It could be based on information from the parents, it could be from the community. Anything at all that might lead me to think that there is a great risk that this youngster would commit another crime if released.

Mr. Guggenheim: I would like to have these documents marked as a Petitioners' Exhibit [43] for [498] identification [ ]. A is a transcript of a hearing and B, C and D are documents relating to that hearing.

(Petitioner's Exhibits 43-A, B, C and D marked for identification).

Q. Judge, I will ask you to read this to perhaps refresh your recollection. It's a transcript in the Matter of Douglas McLaughlin, Kings County Docket Number D3773 of 1978. You presided over an intake hearing and the transcript is three or four pages and I would ask you to look at that now.

A. Yes.

Q. Have you read the documents?

A. Yes, I have.

Q. Do they [refresh] your recollection at all; do you remember anything about this case?

A. Individually, no. Other than what I just read now, no.

Q. That was a case, was it not, in which a child had no previous convictions, was accused of a burglary and you ordered him in pretrial detention?

A. That is correct. What was the date of that, I don't recall it again.

Q. July 7, 1978.

A. 1978, okay.

* * *

[505] Q. How can you account, Judge, for the fact in a case where the initial reaction of the court is to detain a child based on a prediction that he will commit another crime or crimes if not detained with an ultimate disposition in the case of probation?

A. Probation indicates that there has been a finding in the case. You have to have a fact finding otherwise probation wouldn't be discussed.

Now, when it comes to the dispositional hearing, the main purpose of the dispositional hearing or [506] the main thrust would be the best interest of the child. In a dispositional hearing you are supposed to keep the child's best interest at heart and I think that—well, speaking for myself, I think that any kind of detention at a dispositional hearing is a very harsh solution to the problem and you will look for the least harmful or to the most beneficial disposition at dispositional hearing keeping the best interest of the child in mind and many times that is probation.

Q. So, in other words, at the outset of a hearing the court is more likely to react harshly, is that right, and at the end of the hearing is more likely to take into account the child's own needs?

A. No, I can't say that. You can't draw that conclusion. In some cases it might appear that way but I wouldn't say that you can make a general statement such as the fact that there have been many youngsters who have been paroled at the beginning and wind up being sent to Division for Youth at the dispositional hearing because that happens to be in the best interest of the child.

> The Court: Don't you have or do you have different facts before you at the dispositional hearing than the fact finding?
>
> The Witness: No, the dispositional hearing is [507] the hearing after the fact finding. Shall we say the sentencing part, that's what we call the disposition. Yes, there are different—there is different information before you. You have a complete, up to date probation report. You might have psychiatric and psychological reports. You have more. It is more complete than most 739 hearings and it is geared especially to this situation. It is prepared especially for this fact finding, this dispositional hearing. It is more complete, usually. Again, in disposition, you are talking about a long range program for the youngster.
>
> • • •

Redirect Examination by Ms. Gordon:

Q. At the dispositional hearing, Judge Quinones, do you take account of the fact that a child who has been previously remanded has already spent some time in a restrictive environment in coming to your disposition?

A. Yes, that is taken into consideration also.

Q. In addition to the fact that you have the more up to date investigation and report and psychologicals for a child coming up for a disposition, is it possible [508] that also in the intervening time, that is, from a 739 detention until a disposition, that the facts, some facts relating to that child may have changed?

A. Yes. A lot of changes might have taken place. The family might have moved out of the neighborhood where this activity was taking place. There might be a change in the family composition itself.

We have a much more complete probation report which might bring out facts, bring it right up to date. Perhaps in the interim the youngster has received some additional aid.

Many times it is done by the Legal Aid Society itself who puts their social workers to work with the child or maybe another neighborhood agency has intervened in the present time. There might be several months between the act itself and the dispositional and during that time many factors might come into play that did not exist at the time of the 739 hearing. School. We might have been able to contact school. We might have school records that might not be available immediately in a 739. It is a much more complete picture of the youngster, usually.

• • •

[511] Q. I would like to know, Judge, since we do have a couple of burglaries here and an arson, whether or not

you consider in your own understanding a burglary or a arson to be a property crime or a crime against the person?

A. Essentially I believe that they are crimes against property. They could turn into situations where somebody is hurt, but essentially they are property crimes, I would say.

• • •

[512] The Court: All right. I have a question and I'm just not sure that it is fair to ask it, though.

I am very disturbed by this statute and it seems to me that it tilts the whole concept of the criminal justice system from being innocent until you are proved guilty from the other way, as far as juveniles are concerned. Actually what I would like to know, and you don't have to answer it if you think it is unfair, particularly in light of what has been brought out about the greater information that you had at the dispositional hearings, as to whether you really feel that judges at 739 hearings have the sufficient knowledge and information to make the kind of prediction that they are required to do by the statute?

The Witness: Well, Judge, that is a subjective question and if you begin with the premise that any detention is undesirable and you work against that, in other words, first you start with absolutely no detention and you let the facts and circumstances overcome that strong presumption, then I find that in my experience in New York City we do have situations where if for no other reason but for the protection of the community we must have some means in certain cases for [513] detention. But starting out with the premise that detention is an undesirable thing.

• • •

Testimony of Ralph E. Kelly
(Excerpts)

[515] RALPH E. KELLY called as a witness by [the State], was duly sworn and testified as follows:

Direct Examination by Ms. Gordon:

Q. Mr. Kelly, by whom are you employed?

A. New York City Department of Juvenile Justice.

Q. What position do you hold?

A. Deputy Commissioner for Operations.

Q. What are your responsibilities as Deputy Commissioner?

A. As Deputy Commissioner I am responsible for all the programs and operations that the department runs [516] which include nonsecure detention, secure detention, training, court service programs.

* * *

Q. How long have you been with the Department of Juvenile Justice?

A. Since its inception in July of 1979.

Q. What undergraduate or graduate degrees do you have, if any?

A. I have a bachelor's degree in sociology from the University of Pittsburgh, a masters degree in child psychology from the University of Pittsburgh and a [517] certificate of child welfare development from St. Francis College.

Q. Would you briefly describe your professional experience before joining the Department of Juvenile Justice in 1979?

A. Yes. I have about 20 years of child welfare experience. Prior to becoming Deputy Commissioner for Juvenile

Justice, I was a senior management consultant for Kirschner Consulting Company in Washington D.C. We worked for HEW in consultation and management for a variety of social services throughout the country. Prior to that I was a freelance consultant here in New York City in the metropolitan area.

From 1974 through 1977 I was executive director of St. Agnes Home and School for children. St. Agnes is a large multi-functional child caring agency serving more than 350 children and families who are emotionally disturbed and predelinquent and delinquent.

Prior to that I was director of Holy Cross Campus, residential treatment center for delinquent boys and girls in upstate New York, [s]erving youngsters who are primarily from the New York City and metropolitan area. These youngsters are both emotionally disturbed and delinquent.

[518] Prior to that I was in St. Vincent's Hall in Brooklyn. I was director of child care. Prior to that I was counselor, student, et cetera.

• • •

Q. Are you a member of any professional organizations currently or could you tell us what organizations that you belong to currently that you believe are significant?

A. Currently I'm president of the National Organization of Child Care Workers, executive treasurer of the New York State Association of Child Care Workers, a fellow of the American Ortho-Psychiatric Association, a member of the National Association of Social Workers and a variety of other youth related organizations.

• • •

[520] Q. What types of detention facilities does the department operate in New York City?

A. Primarily two types. Secure detention which is Spofford Juvenile Center up in the Bronx and nonsecure detention which consists of 18 beds in foster boarding homes, two group homes or, actually, agency operated boarding homes would be the technical term for them and two group homes under contract with Pius XII School. In total we have 56 beds in nonsecure detention and a couple hundred beds in secure detention.

• • •

[524] Q. Would you please just describe briefly what the nonsecure, NSD program is, starting with the quality of its restrictiveness, if it has such a quality?

A. Yes. Actually, nonsecure detention is the opposite of secure detention. It means that the youngsters while they are remanded to the custody of the Commissioner of Juvenile Justice are under our custodial jurisdiction and are living in a setting that is open. By open I mean it is a setting in the community. There are no locks, no bars, there are no security officers on the door. The youngsters virtually are subject to the authority of the staff and are virtually free to come and go. It certainly is not a place that is unsupervised. The kids get supervision from the staff but it is an open facility, as open as one could possibly be.

• • •

[528] Q. And I ask you whether or not that part 180 of the state regulations provide the minimum standards for secure and nonsecure detention facilities that

come under the jurisdiction of the Department of Juvenile Justice?

A. Yes, they do.

Q. With respect to the secure and/or nonsecure detention facilities that the Department of Juvenile Justice operates, are they under any other order or [529] mandate other than the state regulations part 180?

A. Yes. There is the Martarella decision from 1974 which we are bound by.

• • •

[530] Q. Is there a screening unit at Spofford?

A. Yes, there is.

Q. What is the purpose of the screening unit?

A. The purpose of the screening unit is to attempt to divert youngsters who have been arrested by the police after Family Court—when Family Court is not in session, to divert as many youngsters as possible out of secure detention either into nonsecure detention or return them to their home so they can return to court the following day.

• • •

[531] The Court: • • • What does the assessment unit do?

The Witness: The assessment unit operates in the family courts with youngsters remanded in our custody. When a youngster is remanded to us, we have social workers in each of the family courts. They make an assessment of that youngster based on as much previous [532] information from probation they can get, as much information around the current petition they can get and then their own

professional judgment. That decision determines whether we place that youngster in a secure facility such as Spofford or in one of our nonsecure facilities.

• • •

[533] Q. Commissioner Kelly, in answering the Judge's questions, you indicated that the court assessment unit makes a determination as between secure and nonsecure detention following a remand of the child by the Family Court. If the order, the judge's remand order [says] on it remand JC [Juvenile Center] or remand Spofford, does the court assessment unit still make the determination as between secure and nonsecure detention?

A. Yes, they do. They are supposed to certainly consider the judge's endorsement, but the assessment unit is clear about the fact that the department exercises complete responsibility and authority to place youngsters within the detention system to where we see best.

• • •

[534] Q. I show you [State's] Exhibit B-2 [and] the overpage and I ask you whether or not that is the form in use currently by the court assessment unit?

A. Yes, it is.

Q. And I show you the document following which is [State's] Exhibit C consisting of three pages and ask you whether or not that is the document currently in use that defines the procedures that the court assessment unit follows?

A. Yes, it does.

Q. I call your attention to the caption of the document which says "Assignment Unit Procedures".

Is assignment and assessment essentially the same term?

A. It means the same thing. Some of these documents need some up dating but it means the same thing.

• • •

Q. On [State's] Exhibit C, Commissioner Kelly, down at the item B where it says PINS or delinquency [535] allegations.

Are PINS allegations any longer relevant in this context?

A. Our department has no jurisdiction over PINS.

Q. Does this court assessment unit have any jurisdiction over PINS?

A. None whatsoever.

Ms. Gordon: Your Honor [State's] Exhibit I for identification.

Q. I show you Defendant's Exhibit I for identification entitled "Guide for Preparation of Intake Study for Detention Care" and it is dated January, 1975, and ask you whether or not this is the current guide for the preparation of the court assessment forms?

A. Yes, it is.

Ms. Gordon: I offer it in evidence, your Honor, as [State's] Exhibit I.

• • •

([State's] Exhibit I was received in evidence).

• • •

[537] Q. What kinds of personnel staff the court assessment unit in the five boroughs?

A. Social workers. All of them have at least their bachelors degree and all of them have several years experience. Their supervisor is a licensed social worker with a masters in social work.

Q. Since you have been Deputy Commissioner, have you had occasion to investigate the effectiveness of the court assessment unit in making decisions about children as between secure and nonsecure detention?

A. Yes. It's been a source of continuing re-examination.

Most recently we commissioned a task force to kind of re-assess or re-evaluate the JDs in Spofford. We did this back in January and we evaluated about 40 juvenile delinquents, of which the results of—would you like to hear the results of that study?

Q. Yes. If you have notes you may use them to refresh your recollection.

A. On January 7 the staff took 40 juveniles who were currently being held for Family Court and were in secure detention. They assembled all of the records and the material related to those youngsters.

By the time they were ready to do a day long [538] analysis, which took place on January 16, 18 of the youngsters had already become ineligible.

Now, the purpose of the study was to find out, again to re-assess those youngsters in terms of trying to put some of those kids into NSD, if possible.

By the 16th, 18 of the 40 had become ineligible in the terms six had been transferred to DFY on an interim basis, during the interim basis, four had already been transferred to NSD, because we have a mechanism that works automatically in terms of re-assessing youngsters. So four had

already, through the normal mechanism, gone to nonsecure detention.

Seven had been released from our custody through the courts and one had become a JO case.

• • •

The remaining 22, they were assessed against our standards as well as some standards that were issued by the national advisory board, which is [entitled] standards for juvenile's eligibility for admission to secure facilities. Basically of the 22, 17 met even those standards and belonged in secure detention.

The remaining five, they were broken down as follows: One had numerous cases dating back to 1973 [539] and '75, '76 and '79 both here in New York City as well as in Washington, D.C., and currently he was refusing to talk or even give his current whereabouts.

Another youngster had been known to our NSD program. He had absconded three times from nonsecure detention. He had also caused quite a bit of difficulty to the other youngsters there and on one occasion he had placed a match, a lit match to the neck of another youngster.

> Mr. Guggenheim: I object to this answer and move to strike it on the grounds of relevance. There has been no testimony that this is a profile of all of the individuals in the facility and to just randomly select individuals and talk about them I think serves no purpose in this case at all.
>
> The Court: You are rather long in making the objection, Mr. Guggenheim.

• • •

[541] The Court: I think my whole feeling is that this has nothing to do with it, but since Mr. Guggenheim has not objected to it until some examples have been given, you may proceed.

I think it's all irrelevant and I am probably not going to consider it, but you may proceed with it.

A. The third youngster of the five that were left had 36 prior arrests, mostly stealing from out-of-state trucks and on most occasions the drivers never appeared in court so they were never able to get a conviction.

Of the other two youngsters, there was no appropriate NSD facility available. Breaking those two [542] youngsters down and saying [ ] we would have placed them had we had a different kind of facility, one youngster was a boy who constantly exposed himself and masturbated in front of every woman plus instigated a lot of fights.

• • •

[543] A. And the other youngster, the fifth youngster, was a girl who had a drug problem, had been arrested for possession of a loaded gun. If we had a group home for girls we would have placed her in a group home, but we could not find a foster home that would take her.

• • •

[544] The Court: The people in terms of this study, [545] there has been no effort to isolate those that are remanded under I think they call it a 739 hearing, after a 739 hearing, but before fact finding determination; you don't know whether these are covered by that?

The Witness: I couldn't be sure.

• • •

[555] Q. Do you have any information on the average length of stay of a child at Spofford?

A. Yes, I do.

Q. What is the average length of stay?

A. From a period from July through February, it's about nine days.

The Court: That was July of '79?

The Witness: Yes.

• • •

[561] *By Ms. Gordon:*

Q. Do you have any information, Commissioner, on the recidivism rate of admissions to Spofford; that is, children who have been admitted to Spofford more than once for the same time period?

A. Yes. For this period the recidivism was 52 percent.

The Court: By that, as I understand it, your 52 percent of the population between July 1, 1979 and February 29, 1980 had been there before?

The Witness: Had been there at least one or more prior days.

Q. Is that times or days?

A. Prior times.

• • •

[567] Q. In terms of housing the children at Spofford, are they grouped in any way by age or behaviors?

A. Yes, they are.

Q. Would you please just tell us how that works?

A. Well, we have dorms for younger children, middle age children and older children and then we make some

determination in terms of the youngster's aggressiveness.

I mean, you could have a 13 year-old youngster who is very large and very aggressive and we might house him with kids who are 15.

[568] Vice versa, we might have a 15 year-old youngster who is very small, very fragile and we would put him with our youngest population.

Q. You mentioned dorms. Do the children sleep in a dormitory or what is a dorm?

A. A dorm is a living unit. A living unit consists of a recreation area that has a TV in it and some lounge chairs and some games of various types. It has bath—toilet facilities as well as shower facilities and then it has individual rooms for each youngster.

Q. The individual rooms for each youngster, are those the sleeping accommodations and places for his personal effects?

A. The kids don't have very many personnel effects, but that would be a place for them, those that they have.

Q. Do children at Spofford wear uniforms?

A. No, they do not.

Q. Are there requirements as to their clothing?

A. Yes, they are required to wear the clothes issued by the institution. Boys are. Girls keep their own clothing.

Q. What kind of clothing is issued by the institution to boys?

[569] A. Dungarees, sport shirts, T shirts, jackets, sneakers.

Q. Are there any uniformed guards on the interior of Spofford?

A. Not on the interior. The interior is run by juvenile counselors who are not guards or correction officers.

We have special officers who take care of the front of the building, the points of entrance by visitors and other kinds of guests, and they wear a uniform.

> The Court: Are these dorms separate buildings?
>
> The Witness: They are all in the same building. You might have two dorms on a floor side by side, but there are separate entrances and if I am in one dorm and you are in the other, you and I are completely separated.

By Ms. Gordon:

Q. In terms of the relationship between the dorm unit and the activities at the facility, does the child proceed with his dorm unit or does he proceed with other dorm units?

A. Most of the activities are done by dorms.

Now, in certain areas you might have two or three dorms in the pool, for example, two or three dorms [570] in the gym or two or three dorms in the yard, but most of the activity is done [by dorm].

Education has changed more recently so that's more individualized than done in dormitory groupings.

• • •

Q. Commissioner, do you think that there are any positive effects of pretrial detention of juveniles?

A. There are some positive effects that some of the kids get when they are in Spofford.

Q. Could you tell us what they are?

A. Well, we have social workers that counsel the kids. We have juvenile counselors that do counseling. [571] We have recreational programs.

Many of the youngsters have never been to school in any consistent way so they get schooling while they are there.

Q. Are there any detrimental consequences to pretrial detention?

A. There [are] detrimental consequences to institutionalization to most people and kids are no different. Certainly it's detrimental when you are in such a large institution such as Spofford as opposed to a smaller institution.

• • •

[571] *Cross-examination by Mr. Guggenheim:*

Q. Commissioner Kelly, what is the size of the staff population at Spofford?

A. Approximately 350.

Q. What is the size of the staff population that works directly with the youth, the counselors I think was the term you used.

A. Right. There are two counselors on each dormitory at all times and the population of a dormitory ranges from 16 to 24, depending upon the size, the number [572] of youngsters in the house.

• • •

[573] Q. There has been reference made in your direct examination to the Division for Youth regulations concern-

ing juvenile detention facilities. You are familiar with those regulations?

A. Somewhat.

Q. Are they applicable to your facility?

A. Absolutely.

Q. Do those regulations contain any maximum number of staff to inmate ratio?

A. Yes.

Q. Do you exceed that?

[574] A. At the moment we are exceeding it, that's correct.

• • •

[575] Q. Do you have any problems with assaults by inmates on staff at Spofford; any problems with assaults by inmates on other inmates?

A. Yes.

[576] When you say problem, we have incidents of those.

Q. Are those incidents at all related to the fact that you have convicted juveniles housed there?

A. No, I don't think so. I think they are related to other factors.

Q. What are those factors?

A. Oh, I think one factor would certainly be when we inherited Spofford and even to this day, we don't have the kind of program that we think ought to be going on there. I think size is another factor that causes many of those kinds of problems.

Q. Are you familiar with the term "room confinement"?

A. Yes.

Q. Are you familiar with the term "group confinement"?

A. Yes.

Q. What is room confinement?

A. My understanding of room confinement is when a youngster is put in his room and told to stay there for a period of time.

Q. Is anyone else allowed in the room during that period of time?

[577] A. Usually not. Notwithstanding staff.

Q. What is group confinement?

A. When a group of youngsters are confined to their dormitory.

Q. If group confinement is imposed, is it imposed on all inmates housed in the particular dorm?

A. When it is used, it would probably be used for the entire dormitory.

Q. Is it usually used as a punishment for what some boys have done justifying the use of it?

A. Not necessarily a punishment. It sometimes is used as an alternate to keeping the kids in an area where the staff can work with them and counsel them. Sometimes you have groups getting completely out of hand and may be wanting to get into a fight with another particular group and both groups might be sent to their dormitory, but not so much as a punishment.

Q. Sometimes is it used as a punishment?

A. Sometimes.

Q. And in fact some of the boys that would be punished in this way may not have actually done anything except

live on the dorm in which a problem developed, is that right?

A. If group confinement was used in some ways [578] that it may have been used, yes.

* * *

Q. * * * With whom, if anyone, do the assessment workers interview or talk in making their determination whether or not to recommend nonsecure detention?

A. Well, they talk to the youngster, they talk to the probation officer and many times they talk to the law guardians.

* * *

[584] Q. Do the screening workers interview the juvenile when they come to Spofford?

A. Yes, they do.

The Court: Are these social workers like the assessment unit workers?

The Witness: No, they are in the juvenile counselor series in terms of their title but they are experienced juvenile counselors and they are supervised in that function by a professional social worker.

The Court: Unlike the assessment unit, they are not—

The Witness: Unlike the assessment unit, they are not social workers, but they would have, for the most part, extensive experience as juvenile counselors.

Q. What do they discuss with the juvenile in the [585] interview?

A. There is an interview guide that they go by and they discuss a variety of things related to the youngster's past and how the youngster got into difficulty.

Notwithstanding the scoring mechanism on the screening instrument, they are trying to make a professional judgment as to whether this youngster can go into a holding facility rather than Spofford, which is an open facility, a[ ] group home where he would live until court is in session or whether he can go back to his own home and stay there until court is in session.

Q. One of the things I take it that is discussed is the circumstances leading to the child's arrest?

A. Yes. They would discuss that.

Q. Would they ask the juvenile what he or she was doing at that time?

A. In terms of—they might ask that question, yes.

Q. Might they ask if they committed the act with which they are accused?

A. They wouldn't ask from the point of view of asking whether the youngster is guilty or not guilty. They might ask a question which might relate to trying to [586] make a determination as to whether the kid was a follower, or does he get easily led into situations, et cetera, so forth. But they would not be interested in getting the kid to admit guilt or not admit guilt.

Q. But they might ask what the individual was doing which led to the person's arrest and whether the person in fact was culpable and responsible for the act, right?

A. They might. I mean—you know, they might ask that.

Q. If after the interview it is determined that the juvenile was the leader rather than the follower in the commission of an act, might that have an adverse bearing on the recommendation to release?

A. It would have a bearing.

There are a number of factors that come into play. For example, the youngster might be the leader, but he might also come in with an adult. There might be an adult in his life who can guaranty his reappearance back in court.

The primary concern of the screening staff is two-fold. One is that the youngster can reappear in court when court is in session.

Q. And the second?

[587] A. The second is that the youngster is not likely to go out after the police have just arrested him and brought him in and go right back to the same area and get arrested again for another crime.

Q. When I use the term "likely to commit another crime" in the context of the assessment unit, you said you didn't know what I meant?

A. The way you phrased the question, I didn't understand it.

Q. But you are familiar with the concept of someone who is likely to commit a crime if not detained, aren't you?

A. I am familiar with the fact that if the staff that is making those judgments feels based on their own professional judgment and based on as much information [as] they have at their disposal that this youngster under our jurisdiction is likely to get into more difficulty, then they have to make certain decisions.

Q. Part of the information utilized to come to that informed judgment is an investigation of what the child was doing which led to his arrest, right?

A. Part of the information of the screening unit might be that, yes.

• • •

[588] Q. Turning your attention to the assessment unit worker's function and process, does a similar interview [to the screening interview] take place with the juvenile after the court has ordered detention?

A. That's correct.

Q. And similarly one of the concerns of the assessment workers is the likelihood that the child will commit a crime if placed in nonsecure detention?

A. One of the factors that is considered along with many other factors is just that.

Q. And the assessment worker is likely to ask the juvenile, is he not, questions concerning the charges that brought the juvenile to court?

A. Yes.

• • •

[591] The Court: Well, when the assessment unit gets it, the court has made that determination that he is likely to commit a crime, hasn't [it]? When it comes to the assessment unit, it is with that determination by the court. They don't have to make it anew, do they?

Mr. Guggenheim: The facts of this case, I think, are that the assessment worker makes another determination of risk to the community?

The Court: Does he in that situation?

The Witness: As I said before, the assessment worker takes the fact that the youngster may commit another crime as one of the factors that they use in

[592] their overall decision as to whether the youngster goes to secure or nonsecure. But that fact alone would not be the determining factor.

Q. But it is taken into account?

A. Everything is taken into account. Everything we know about the youngster is taken into account.

• • •

The Court: You mean some of these youngsters who the court—I want to try to get this straight.

• • • [T]he court has made the determination that in your judgment is not determinative [593] of where he goes in terms of secure or nonsecure?

The Witness: Right. The court has only said he goes into detention.

• • •

[595] Q. • • • At the interviewing stage—I will separate them as well. At the screening unit, when brought to the [596] juvenile center, does the worker tell the juvenile that, "Before I say anything to you, before we have this discussion, you have a right to bring in an attorney to speak with"?

A. No.

Q. At the court assessment unit interview stage, same question, does the worker inform the juvenile that he has a right to bring in an attorney?

A. No.

Q. In fact, by the assessment unit stage an attorney has already been assigned to represent the juvenile, isn't that correct?

A. That is correct.

Q. At the screening unit stage no such counsel has been assigned?

A. That is correct also.

Q. You talked for a short time on your direct examination about adverse consequences of detention. One of the adverse consequences of detention, is it not, that the juvenile who is detained by the police is more likely to be detained by the court, isn't that correct?

A. I don't know. We don't have in the department any statistics to refute or support that.

The Court: What about the notes that your [597] people make—

The Witness: Did you say the notes?

The Court: Or the forms [from the screening unit and the assessment unit], are there any situations in which they have been subpoenaed?

The Witness: Not to my knowledge they haven't.

The Court: Are they kept secure from prosecution?

The Witness: None of our material can be given to anybody without a court order. It would require the court to come in and get that.

• • •

[605] Q. When juveniles are brought into Spofford, are they ordered to remove their clothes and be subject to a strip search?

A. Yes, they are.

Q. Does that happen each time they enter the facility?

A. No. Youngsters who go to court during the day and come back to us don't get strip searched.

The Court: What does the strip search entail?

The Witness: It entails removal of their clothing.

The Court: And a visual inspection?

The Witness: Yes, visual inspection.

The Court: Does it involve examination of cavities?

The Witness: No, it does not.

Q. Are they strip searched after they have visitation with relatives or persons?

A. Not necessarily strip searched. They can be depending upon the person in charge of the visitation believing that there may be reason that the youngster has something. But the staff tries to maintain as much visual observation of the visiting to avoid that.

Q. Are the rooms of juveniles searched at [606] Spofford?

A. Yes, they are.

Q. Daily?

A. Not daily, no.

Q. Are they searched in the presence of the juvenile when they are searched?

A. Not all the time.

• • •

[607] Q. When they move about within the facility, do they walk in lines?

A. Yes, they do, for the most part.

• • •

Direct Examination (Resumed) by Ms. Gordon:

Q. Commissioner, just so we are clear, I take you to [State's] Exhibit B1 and ask, is that form consisting of three pages the form used in the screening unit at Spofford?

A. That's correct.

[608] Q. I would ask you to turn over to page 3 of that form and in subdivision A, if you go down one line or two lines, you find the word "serious", and it has the weight of a point.

What does serious mean?

A. Serious means that it is a felony.

Q. I ask you to go down to subdivision E where it says "PINS warrant". Is that applicable any longer?

A. It is no longer applicable, no.

• • •

[611] Q. • • • You mentioned earlier in the course of your direct examination that you had had a review of the assessment unit's effectiveness as against another standard. I show you [State's] Exhibit M for identification, being Section 3.152, "Criteria for Detention in Secure Facilities-Delinquency" from the [612] National Advisory Committee on Standards for the Administration of Juvenile Justice, 1976, and ask you whether or not that was the standard that was used for the January, 1979, evaluation of the assessment unit?

A. Yes, it was.

• • •

[613] *Redirect Examination by Ms. Gordon:*

[614] Q. On one occasion the Court inquired of you whether the form that is the screening unit form and the court assessment unit form can be made available to the court and I believe you answered him it would only be by court order, is that correct?

A. That's correct.

Q. Now, I ask you whether or not the forms, that is completed forms with respect to particular juveniles, or any information gathered in the course of either the screening unit investigation or the court assessment unit investigation is provided to personnel other than personnel within the Department of Juvenile Justice on a regular or even an occasional basis?

A. No, it is not.

Q. With respect to the under-care staff of either a secure detention facility or a nonsecure detention facility, and by under-care staff, I mean the people that work with the children, are any of those people ever informed of the charges against the child, the current legal status • • • of the Family Court proceedings [against] the child, the nature of the charges, that kind of information?

• • •

[615] A. In general, the juvenile counselor which is the bulk, as well as the house parents, they are called house parents in nonsecure detention, do not know the charges that the kids are there for. They don't know by getting a form that says this kid is here on this kind of charge.

Very often the kids volunteer information and it comes out that way.

The general theme is to try to keep it away from people who don't need to know about it.

• • •

Q. I take you to the regulation that Mr. Guggenheim referred to in the course of your cross-examination, namely 180.7 and you have to go down to (d) of the state regulations and I direct your attention to subparagraph 3-[ii], "there is a serious risk that before the petition is filed the child may do an act which if committed by an adult would constitute a crime".

Do you believe that there are children, juveniles, who fall within that category?

[616] A. Yes. There are some youngsters who fall within that category.

• • •

Testimony of Hon. Margaret Driscoll
(Excerpts)

[629] MARGARET DRISCOLL, called as a witness by the State, was duly sworn and testified as follows:

Direct Examination by Ms. Gordon:

Q. What's your current position?

[630] A. I'm a judge of the Connecticut Superior Court.

Q. And since what date have you been [a] judge of the Superior Court?

A. Since July 1, 1978.

Q. What judicial positions did you hold prior to going on to the Superior Court, if any?

A. I was a judge of the Connecticut Juvenile Court from 1960 to '78 and Chief Judge of that Court from '76 to '78.

Q. What was the occasion for the change in your assignment from the Juvenile Court to the Superior Court, if there was such an occasion?

A. The Courts merged.

Q. You weren't promoted?

A. I didn't think so.

The Court: I'm not familiar with Connecticut state system. Is Superior Court a trial court?

The Witness: Yes, it is the highest trial court and now the only one.

The Court: And in the Juvenile Court, were you at any particular location?

The Witness: The Juvenile Court before the merger had three districts with two judges in each district. My district was Fairfield and Litchfield

[631] counties which was the whole western side of the state from the Massachusetts line to the New York line.

Q. Did your experience in the Juvenile Court prior to 1978 include the hearing and determination of all aspects of proceedings against juveniles accused of crimes?

A. Yes.

Q. Does the jurisdiction of the Superior Court now extend to the hearing and determination of proceedings against juveniles accused of crimes?

A. Yes.

Q. Since you have been on the Superior Court, have you had occasion to sit in proceedings involving accused juveniles?

A. Yes.

Q. And when was that, Judge?

A. From July, '78 to January of '80.

Q. And where did you sit?

A. Well, from July, '78 until January of '79 I was in part of what used to be the first district, that's my district, which was Bridgeport, Norwalk and Stamford. And from January, '79 to July, '79 I was in Waterbury where I sat part time on the juvenile bench there. And from July of '79 to January of 1980, I was in Danbury where I [632] sat on the juvenile bench part time.

Q. Could you please briefly describe your professional experience prior to becoming a judge?

A. Well, I was in general practice from 1938 to 1960 with some emphasis on labor law and lobbying for social and labor legislation. I was counsel for the state labor council, first, for the CIO and then AFL-CIO.

Q. Do you have a law degree?

A. Yes, from Yale.

Q. From what school do you have your undergraduate degree?

A. Wellesley.

Q. Could you please describe the professional organizations that are concerned with juvenile justice in which you have participated?

A. The National Council of Juvenile and Family Court Judges, the New England Council of Juvenile Court Judges, the American Bar Association Family Law Section. The National Advisory Committee on Juvenile Justice and Delinquency Prevention.

Q. What role did you play, if any, or what position did you hold in the National Council of Juvenile and Family Court Judges?

A. I'm a past president and have held offices up [633] to that point.

Q. When were you president of the Council?

A. 1976 to '77.

Q. What is the purpose of the National Council of Juvenile and Family Court Judges?

A. To improve and maintain the high standards for the exercise of juvenile jurisdiction by training judges who sit on juvenile matters both through a college which is maintained at the University of Nevada and also institutes that are held throughout the country either by the National Council alone or with the National Association of District Attorneys or the National Association of Public Defenders or, on occasion, the National Parent-Teachers Association.

Q. Did you participate in any way in developing the curriculum for the college that you just mentioned?

A. Yes. I was on the training committee before I was president and while I was president I was an ex officio member of it. I also taught at the college on occasion.

Q. * * * What position, if any, or positions have you held with the National Advisory Committee on Juvenile Justice and Delinquency Prevention?

A. Well, I have been a member of the standards [634] committee and I have just been appointed chairman of that committee.

Q. When did you become a member of the standards committee of the National Advisory Committee?

A. 1977, when I became a member of the national committee.

Q. Judge Driscoll, I show you New York State Family Court Act 739 in the McKinney's volume and the current paperback supplement and tell you that in New York that statute may be used by a Family Court judge to detain a juvenile who has been accused of a crime prior to the adjudication of his guilt on that crime.

Would you just look at it for a moment and familiarize yourself with it?

A. Yes.

Q. I direct your attention to Section 739 subdivision [a][ii] as it appears in the pocket part and ask you if you have an opinion as to whether or not there are juveniles who, if released prior to adjudication, are a risk of committing a crime?

Mr. Guggenheim: Objection, your Honor. It is beyond the competence of the witness to answer.

The Court: Well, I don't think that helps me at all. I'm going to sustain the objection because I [635] don't think the question is going to give me any benefit or is of any benefit to me. I'm sure there are people like that. I'm sure there must be people who are going to commit crimes. That's beside the point.

Ms. Gordon: First of all, it is the threshold point in this case. If there were not juveniles who had that risk, then we certainly would be discussing a statute in a system with no application. If the point is conceded—

The Court: There would be no due process issue.

Ms. Gordon: Exactly. That is certainly true. If that point is conceded then—

The Court: The point is[.] I think the question gets us nowhere so that I am sustaining the objection.

• • •

[638] Q. Judge Driscoll, based on your knowledge and experience, are pretrial juvenile detention standards that require a projection of whether a child will commit a crime in the future common in the United States?

A. Yes.

• • •

The Court: So I will be sure that I understand what your response means by way of comment, I gather that I am to understand that these kind[s] of standards are rather—detention that is, is practiced in the majority of the states?

The Witness: That has been so. At least the last compilation I saw was '75 and while there have

been some changes I don't think there have been that many.

The Court: So most of the states have some kind of proceeding similar to New York City, is that what you said?

The Witness: At least some kind of provision.

Q. Do you recall, Judge, I believe you mentioned [639] 1975, '75-'76, was the last compilation you were familiar with. Do you recall as of that time approximately how many jurisdictions in the United States had a standard such as * * * 739 (a)(ii)?

A. 46 i[n] what is known as the preventative detention.

* * *

Q. Judge Driscoll, I have given you [State's] Exhibit M for identification which purports to be a Section 1030 of a Chapter 35 of the Connecticut Practice Book. Would you please tell us what that document is?

* * *

A. Those are the Rules of Practice with respect to detention proceedings and the basis for detention.

* * *

[641] Q. Judge Driscoll, I direct your attention to subparagraph 1 of Section 1030 in what is now [State's] [642] Exhibit M in evidence, and ask you whether or not that subparagraph is the only court rule in Connecticut stating the basis for the detention of juveniles who are accused?

A. No, there is presently a statute which also has provisions with respect to detention.

Q. Is it the only court rule?

A. Only court rule, yes.

• • •

[643] Q. Turning back to the court rule, judge, for a moment, that is [State's] Exhibit M, and specifically subparagraph 1 of Section 1030, can you tell us approximately how long subparagraph 1 of Section 1030 has been in effect in Connecticut?

A. Well, at least since 1968, it may have been '67. And it may also have been prior to that but I know we have made major changes in our rule following the *Gault* case.

• • •

[644] What role if any did you play with respect to subparagraph 1 of Section 1030?

A. Well, I was one of six judges who drafted it or amended it. I have forgotten whether it was in effect or in what respect it was in effect before but something was in effect before. That is when there were three judges.

Q. Judge Driscoll, I ask you to turn to Section 4 of Public Act Number 79-581, that is now [State's] Exhibit N in evidence.

A. Yes.

Q. I ask you whether or not that is the only statute in Connecticut dealing with the basis for detaining juveniles accused of crimes?

A. Well, accused of crimes, yes.

Q. Judge, can you tell us what portion of subdivision 4 was new in 1979, namely, under this PA 79-581?

A. The part which appears in capitals.

[645] Q. Is that commencing "no child"?

A. "No child shall be placed in detention".

Q. And down to "superior court"?

A. Down to "superior court", yes.

The Court: The legislature codified the rules of the court and adopted them?

The Witness: That's right.

• • •

Q. Judge, since 1967-68 and while you have been on the Connecticut bench, have you had occasion to make determination under Section 1030 subparagraph 1 or this subdivision 4 of the Public Act of 1979?

A. Yes.

Q. And can you estimate for us approximately how many such determinations you have made, that is, applying the criteria that is set forth in subparagraph 1 of Section 1030?

A. Well, since, say, '68 I would estimate about 1500 to 2000. That's a low figure.

Q. I call your attention to the portion of Section 4 which is not in capitals but states that, "such child may, by the judge, be admitted to bail, pending final disposition, or may be released in the custody of [646] the probation officer, his parent or some other suitable person".

A. Yes.

Q. I ask you, Judge, prior to 1978, that is the merger of the Juvenile Court with the Superior Court, was it common for judges to admit accused juvenile delinquents to bail in Connecticut?

A. No, it was not.

• • •

[649] Q. Is the authority, the discretionary authority of a judge to admit a child to bail effective with respect to the detention criteria set forth in the balance of Section 1030 and specifically subdivision (b) of subparagraph 1 of Section 1030? I don't think I have made that much clearer but that is the question.

The Court: Do you understand the question, Judge?

The Witness: I know what she is trying to get at.

The Court: I will overrule the objection. Please explain it to me.

The Witness: It is why don't we use bail, I think that's the question. Why would we not use bail when it is so common[? T]he answer is, bail, in my opinion, is irrelevant in terms of having any effect on the child's pattern of delinquent behavior thereafter. Because bail with children under 16, which is the juvenile age in Connecticut, would have to be put up in practically every instance, if not all, by parents who might have a variety of reasons for not wanting to put up bail and also I don't think that whether a child or a parent can put up bail and is able to put up bail has any [650] relevance as to whether the child has a potential for committing delinquent acts. The parents who can put up the most money are sometimes the ones who have the least supervision. So I don't see it as a deterrent factor and I think it is also, if bail were used, it would obviously favor those who could pay.

The Court: But you are using the term, you are talking, am I correct, in terms of the issue as to

whether or not a child ought to be released or be detained, I suppose is better, that bail is not a consideration which you should think would be relevant?

The Witness: Yes.

The Court: There ought to be other considerations?

The Witness: Yes.

• • •

Q. Turning to the Connecticut standard itself, Judge Driscoll, as it is set forth in subparagraph 1 of Section 1030, for clarification, I would like to ask you what the meaning of a few terms is. In subdivision (b)—

• • •

[651] Q. What does the term "strong probability" mean?

A. Well, more likely than not.

Q. The subdivision (b) portion goes on to state "other offenses injurious to himself" and then states "or to the community".

What is the meaning of the term "injurious to himself" in that context?

A. Well, it has meant several things. It has meant if for example a youngster is constantly stealing cars, this can become very injurious to him because it usually results in a high speed chase, may result in his even being shot by a policeman. He could be engaged in a series of petty larcenies in which he may be caught by the person from whom he is stealing and that person may use undue force, or a policeman catching him in the act and then having him run, may also use force, like shooting at him.

Those are two that come to mind. And the very fact that a youngster continues to commit offenses [652] against the law, it seems to me put him in a position of jeopardy which is injurious to him. So that is one interpretation.

Q. Still within that subparagraph (b), judge, the use of the term "offense" both in [State's] Exhibit M and [State's] Exhibit N, does the term offense subsume a crime that is a felony or misdemeanor in Connecticut?

A. That's been the interpretation.

Q. I draw your attention to the phrase following (b) and that is (c) in Section 1030 subparagraph (1) which states, "reasonable cause to believe that the child's continued residence in his home pending disposition will not safeguard the best interests of the child and the community because of the serious and dangerous nature of the act or acts set forth in the attached delinquent petition".

I ask you whether or not that provision, that is (c), looks to what the child will do to the community potentially or what the community will do to the child?

A. Both.

Q. Could you explain?

A. Well, if, for example, a child has committed either an armed robbery or a murder and it is of someone within the area where he lives, the possibility of the [653] neighbors taking some action is a very good one. If he has committed an assault on another member of the family, the possibility of the family itself taking action is a very real one. Those are two things I can think of.

Q. Turning to the actual application of the standard in Connecticut, Judge Driscoll, I call your attention to the opening phrase of subparagraph (1) in [State's] Exhibit

M which also appears in Section 4 of [State's] Exhibit N, stating that "no child shall be placed in detention or thereafter held unless", and it goes on, "there is reasonable cause to believe" that he has committed the act in question.

I ask you, what papers or testimony, if any, are contemplated by the reasonable cause standard in Connecticut?

A. Well, 1032 subsection (2) does provide that any testimony which is material and relevant may be entered into evidence. It has been the practice of some of the judges to proceed on affidavits as to reasonable cause. My own practice has been to require testimony.

Q. Are the affidavits in support of reasonable cause, affidavits of people with direct knowledge of the events that constitute the crime?

A. Yes.

• • •

[656] Q. Judge Driscoll, let us assume that you have a juvenile who comes before you, accused of an act which would constitute a felony in Connecticut and you have [657] information about the child's home environment, the child's school environment, the nature of the charge for which he is currently accused and his prior record, if there is any, in terms of making a determination under subdivision (1) of Section 1030 and specifically under subdivision (b) of that section, strong probability that the child if released may commit another offense, what in that body of information do you look to in coming to your decision under the statute?

A. Well, I look to several things. I look to the record of prior delinquent conduct. I would look—

The Court: Prior delinquent conduct?

The Witness: Adjudication, yes. I would look to the time when this offense was committed to de-

termine, for example, if the child was out hours when normally he should be in and I would look—that would say something to me about the amount of control that his parents have over him and that would be a key factor, what control the parents have exercised or have attempted to exercise and whether there is really anybody who is in a position to control him and I would, therefore, also want to know whether he is going to school, for example, which is one of the things which indicates whether he is in or out of control.

[658] What else was there? I think that's about it.

The Court: So it would be important in your consideration as to whether the incident occurred let's say at 8 o'clock at night or 2 a.m.? That would make a difference?

The Witness: That would certainly make a difference to me. I would immediately deposit the question in my mind, "why, why was he out at that time?". I can understand that he was out going to a movie that he didn't go to, but it does say something about the parental supervision. Also the nature of the offense. I don't know if I said that before.

• • •

Q. • • • Do you distinguish—or on what basis do you distinguish between offenses, if you do distinguish between offenses, in making the judgment about detention versus release under probability of another offense, under that criteria?

A. Well, the extent of harm either to the child or to the community that might ensue from a repetition of that offense. That would be the thing I would consider.

[659] For example, car stealing, you know, the child is usually referred for taking an automobile without permission and not for stealing a car, which is a misdemeanor. But to my mind that puts everybody in the community in danger once that kid gets on the street with a car. If he has done this repeatedly, I think he is putting himself and everybody else in danger. For that reason, it would be a reason for detaining him because he has not controlled himself based on his prior record.

Q. You mentioned to Judge Carter, in terms of a prior record, you would look to prior convictions or [ ] prior arrests. Are they relevant in your exercise of your judgment?

A. Well, they are relevant but I must say I don't give them that much weight.

Q. One more hypothetical, Judge. Let's assume you have a child who has been arrested for breaking a shop window and to have stolen a small item from that shop window, nothing of substantial value. And at the time he comes before you, you are informed that he has nine prior arrests. Would you have occasion to consider whether or not that—would you have occasion to consider that child appropriate for detention?

A. Yes, I think it would depend on the time [660] factor, were those arrests immediately before this, were they 10 months ago, a year ago and also when was this done? I would like to look at that.

Q. In other words the time of the day?

A. Yes. And all of the other factors as well.

Q. It is essentially an individual determination based on the individual circumstances of each case?

A. That's right.

Q. * * * I show you [State's] Exhibit O for identification.

For the record, the portion I am concerned with is Section 22.4 as it appears on your sheet and it is on the sheet that you have entitled "NAC Report of the Task Force on Juvenile Justice and Delinquency Prevention 1976".

• • •

Q. Judge Driscoll, can you identify that standard for us, what is NAC?

A. National Advisory Committee on Juvenile Justice and Delinquency Prevention.

[661] Q. Is that the committee you mentioned to us before where you served on the standards committee?

A. Yes, I presently do.

Q. Were you on the standards committee when this section here noted as 22.4 was drafted and approved?

A. No.

Q. And did you come to find out about this standard in the course of your work on the committee?

A. Yes, we did the commentary on the standards. That's what our job was primarily.

The Court: Your committee?

The Witness: Yes, with one exception. With respect to status offenders.

• • •

[664] Q. Judge, do you approve or disapprove of this 22.4 standard?

• • •

A. Well, it is too limited, in my opinion, but—

Q. How is it too limited?

A. Well, it is restricting the future prediction not to whether the youngster will commit other offenses but whether he will inflict bodily harm or whether he himself will be subjected to bodily harm. I think—it doesn't have to be narrower, if you read two, which says a juvenile can't return home because there is no person able and willing to supervise him and care for him.

You could read into that a determination that a youngster is without proper supervision if he is [665] continuing to commit delinquent acts.

Q. So in terms of your own preference, would you prefer the current Connecticut standard over this standard?

A. Yes, I would.

Q. By the way, Judge Driscoll, I think I omitted to ask you, the organization with the subcommittee that has promulgated or is in the process of promulgating Section 22.4, what is the purpose of the National Advisory Committee?

A. Well, I guess the purpose of the committee is to advise the President, Congress and the Administrator of the Juvenile Justice and Delinquency Prevention Act with respect to the way that the Act should be administered. I should say also that also as a separate part of its purpose is to promulgate standards on the administration of juvenile justice.

Q. Of which Section 22.4 is an example?

A. Part of.

• • •

[666] Q. Did you participate in developing the Institute of Judicial Administration, American Bar Association standards, commonly referred to as the ABA-IJA standards?

A. Not in drafting the original drafts. I did sit on the drafting committee of the Family Law Section which reviewed the drafts prior to the presentation to the ABA or the House of Delegates.

Q. I show you Section 6.6 of the Guidelines for Status Decision which I think the record should indicate apply to the intake officials * * * but as one goes on in the volume and gets to the juvenile court judge, it is stated in the volume that the same standard applies.

I would just ask you to look at Section 6.6 and I call your attention to the fact that that is the 1977 copy. Would you just look that over. It is 6.6 of the interim status volume.

* * *

[667] Q. Do you have an opinion as to whether or not this standard, that is 6.6(a), is an appropriate basis for the detention, the pretrial detention of juveniles?

A. No. I think it is too limited.

Q. In what sense, Judge, is it too limited?

A. Well, first of all, it is limited to a crime of violence which the sentence has to be one year or more. You have to have that plus one or more of the other factors which is the crime has to be first or second degree murder or the child must be [o]n an interim status which is under (b), under jurisdiction of the court in a criminal case or on probation or he must be an escapee or [668] have a demonstrable or recent record of willful failure to appear or be a fugitive.

There is no provision there for detaining the youngster who has a record of repeating other kinds of acts that are not crimes of violence or, like I indicated, car theft or stealing, where because of the repeated nature of the acts and the time frame in which they are committed, say, maybe a week ago where he has committed another act or two weeks ago and has been released and going back and then comes back. This time there is no basis under this for detaining that child, prevent him from doing other criminal acts. I think that's too narrow.

• • •

[669] Q. Judge Driscoll, what state interest supports a detention standard which looks to the risk of a juvenile committing a crime if released, if any such interest?

A. Well, the basic interest is, of course, the protection both of the community and of the child. I would think that —of course there is a question now under a lot of these standards of whether children are children and whether they are adults. That's the basic premise of a lot of standards that they should be treated as adults.

My feeling is that if we are going to continue to determine that children are different from adults, then we have to look at what that difference is and the difference as far as children is concerned is that they are entitled to protection, to control, to guidance from responsible adults and if their parents or guardian or custodians or the people responsible for them are unable to provide the kind of control that keeps them, for [670] example, from committing crimes, then the state has to intervene to do that.

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Cross-examination by Mr. Guggenheim:

• • •

[673] Q. Now, in focusing on the pretrial detention question in a delinquency proceeding, do you favor the detention of a juvenile in part for the purpose of helping that child?

A. Only in the sense of protecting him from harm which might be occasioned by getting into further delinquent behavior which in turn generates action on the part of either police or the people with whom he is in contact with in committing the delinquent behavior.

• • •

[675] Q. Is it within the ability of a judge in making the decision to detain under the scheme which you have operated as a judge to take into account previous arrests?

A. Yes, it is.

• • •

[676] [*Examination by the Court:*]

The Court: Judge Driscoll, I am quite frank to tell you that I am very troubled by this law. I have had no experience as you have with dealing with minors.

What is, in your view, or would be the rationalization for detaining a minor [ ], which seems to me to be contrary to the principles in the administration of law which [are] utilized in respect to adult crime?

The Witness: With respect to adult crime, you let them out on bail and you let them out not on the basis of even what they have done or what they are likely [677] to do but whether they have any money. So it doesn't seem to me that—

The Court: Well, not entirely. Not over on this side. Sometimes on this end—

The Witness: That's the way it works in the state court.

The Court: We let them out on recognizance and the theory is the purpose of that is not whether they will be free or what the nature of the crime is but whether or not they are going to show up.

The Witness: That's true. But you are dealing with people who are assumed to have the capacity to take care of themselves. Whereas you are dealing with children, by definition, they are not assumed to have that capacity. They are assumed to be subject to the control of their parents.

• • •

[678] The Court: What do you feel is being the minimum that you—let's just assume that a juvenile comes before you with one of these matters and you have to make a determination. Would you be as expansive as you can and tell me all of the things that you would want as a minimum for you in terms of making that determination?

The Witness: Well, I would want the nature of the crime, the circumstances, the extent that they can be determined on a reasonable cause basis.

[679] The Court: You, I understand, prefer to have that done by testimony?

The Witness: By testimony.

The Court: Live witnesses?

The Witness: That's right. I would want to have the record of any prior convictions. I would consider

recent arrests. If there had been a whole string culminating in this, that would make an impression, coupled with everything else. I would like to know what the supervision is going to be for. Whether he is under court supervision or no supervision or whether his parents have been exercising any kind of control, what the attitude of his parents is in terms of being willing to make changes in supervision.

• • •

[680] The Court: Anything else?

The Witness: I would want to know if there are any psychological or psychiatric evaluations of the child and his total background as far as it can be determined at that time. A first offender, you normally wouldn't get that much, and a first offender normally would not be held except for a very serious act or lack of parental supervision.

• • •

[681] School record, whether he's been going to school, where he is in school, agewise, gradewise; whether that indicates some kind of problem, you know, learning disability or retardation or something of that sort. I think that's about it.

• • •

The Court: Now, I gather you said—you said something and I want to get clear on this. Is this a policy consideration on your part that unless, at least I interpret it as meaning this, unless the crime is a very serious one that first offenders, I gather, you don't normally detain them?

The Witness: That's right.

• • •

[683] *Redirect Examination by Ms. Gordon:*

• • •

[684] Q. The detention hearings at which you find reasonable cause, if you do, and consider the detention question, approximately how long do those hearings take?

A. Well, they can take anywhere from 20 minutes to several hours.

Q. Is part of that time used for the reasonable cause assessment?

A. Yes.

Q. You indicated that on the occasion when the probation officer and those individuals are before you, you take testimony?

A. Yes.

Q. Does Connecticut require that the probation officer or the parent testify or can they merely report?

A. Well, it is not required that they testify. I require them to. The rules don't require it.

• • •

Q. Can you tell us what your definition of a serious crime is? I believe you indicated to Judge Carter that the first offender would rarely be held unless it was a serious crime. What is a serious crime?

[685] A. Well, I think a crime which involved serious bodily injury to anyone or one which involved the use of a weapon, like a gun. I have considered taking cars, as I have indicated, when it is repeated as a serious crime because as I have indicated it puts everybody else on that road in danger, including the child.

Q. Does the threatened use of force as distinguished from the actual use of force come within your definition of a serious crime?

A. Yes, a gang type thing, for example, I would consider a very serious matter.

Q. Let me give you just one example. Let's say three boys of the age of 15 surround a woman on the streets of New York and do not show any weapons, but seek to take her purse, is that—

A. That's serious.

Q. Is that a serious crime?

A. Yes.

• • •

Stipulation and Order
(Excerpts)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

[TITLE OMITTED IN PRINTING.]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the petitioners and the Attorney General *Pro Se*:

• • •

2. The trial exhibits of the petitioners and the Attorney General *P o Se* are as set forth on the annexed exhibit lists. The lists have been modified since the close of trial without objection from either side. Petitioners have included PX 37 A-D [excerpts from the (Draft) 1979 N.Y.S. Division for Youth Annual Report], PX 38 (excerpts from the 1978 Annual Report of the Office of Court Administration) and PX 44 [excerpts from the (Draft) 1980 Vera Institute Family Court Disposition Study]. The Attorney General has included SX O—SX R [extrapolations from data contained in the (Draft) 1979 N.Y.S. Division for Youth Annual Report], SX S (Table 48, 1979 United States Census) and SX T [Order in *Martarella* v. *Kelly*, 71 Civ. 3159 (MEL) (SDNY Mar. 26, 1975]. PX 37 A-D and SX O—SX R include data requested by the court during trial to the extent it was available or could be generated in a timely manner.

• • •

Dated: New York, New York
May 30, 1980

[Attorneys' subscriptions and addresses omitted in printing.]

SO ORDERED: 6/3/80

/s/ ROBERT L. CARTER
U.S.D.J.

Stipulation and Order (Exhibits' List—Petitioners)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (R.L.C.)

[TITLE OMITTED IN PRINTING.]

PETITIONERS' EXHIBITS[†]

1a—Transcript[s] of Detention [and Probable Cause] Hearings, December 14 and 19, 1977, *Matter of Gregory Martin*, Bronx Docket No. D3900/77
1b—Petition of Delinquency for Gregory Martin
1c—Family Court Docket Entries for Gregory Martin
1d—Final Order of Disposition for Gregory Martin

2a—Transcript of Detention Hearing, March 15, 1978, *Matter of Luis Rosario, et al.*, Kings Docket No. D1310/78
2b—Petition of Delinquency for Luis Rosario
2c—Family Court Docket Entries for Luis Rosario

3a—Transcript of Detention Hearing, March 27, 1978, *Matter of Kenneth Morgan*, Queens Docket No. D763/78
3b—Petition of Delinquency for Kenneth Morgan
3c—Family Court Docket Entries for Kenneth Morgan
3d—Final Order of Disposition for Kenneth Morgan

4a—Transcript of Detention Hearing, August 24, 1977, *Matter of Vincent Harris, et al.*, Kings Docket No. D5050/77
4b—Petition of Delinquency for Vincent Harris
4c—Family Court Docket Entries for Vincent Harris
4d—Final Order of Disposition for Vincent Harris

[†] Petitioners' trial exhibits are included in Document Number 26 of the Record on Appeal. They are marked as shown on the following list and are in sequence.—*Ed.*

Stipulation and Order
(Exhibits' List—Petitioners)

4e—Petition of Delinquency for Phil Hanna, D5051/77
4f—Family Court Docket Entries for Phil Hanna
4g—Final Order of Disposition for Phil Hanna D5052/77
4h—Petition of Delinquency for Calvin Jenkins
4i —Family Court Docket Entries for Calvin Jenkins
4j —Final Order of Disposition for Calvin Jenkins

5a—Transcript of Detention Hearing, September 12, 1978, *Matter of James Price*, Bronx Docket No. D3111/78
5b—Petition of Delinquency for James Price
5c—Family Court Docket Entries for James Price

6a—Transcript of Detention Hearing, November 28, 1977, *Matter of Johnny McArthur*, Kings Docket No. D6567/77
6b—Petition of Delinquency for Johnny McArthur
6c—Family Court Docket Entries for Johnny McArthur
6d—Final Order of Disposition for Johnny McArthur

7a—Transcript of Detention Hearing, November 12, 1976, *Matter of Christopher Cox*, et al., Kings County Docket Nos. D8571/76; D8567/76; D8580/76; D8576/76
7b—Petitions of Delinquency for Christopher Cox
7c—Family Court Docket Entries for Christopher Cox
7d—Final Order of Disposition for Christopher Cox
7e—Petitions of Delinquency for Wade Forde, D8577/76 and D8582/76
7f—Family Court Docket Entries for Wade Forde
7g—Final Order of Disposition for Wade Forde

8a—Transcript of Detention Hearing, March 17, 1978, *Matter of Francisco Ramos*, Kings Docket No. D1359/78
8b—Petition of Delinquency for Francisco Ramos
8c—Family Court Docket Entries for Francisco Ramos

Stipulation and Order
(Exhibits' List—Petitioners)

9a—Transcript of Detention Hearing, April 6, 1977, *Matter of Darryl Larkin*, Kings Docket No. D2068/77
9b—Petition of Delinquency for Darryl Larkin
9c—Family Court Docket Entries for Darryl Larkin
9d—Final Order of Disposition for Darryl Larkin

10a—Transcript of Detention Hearing, October 20, 1977, *Matter of Jerome Basnight*, Bronx Docket No. D3277/77
10b—Petition of Delinquency for Jerome Basnight
10c—Family Court Docket Entries for Jerome Basnight
10d—Final Order of Disposition for Jerome Basnight

11a—Transcript of Detention Hearing, March 25, 1977, *Matter of Jose Cruz*, Kings Docket No. D1835/77
11b—Petition of Delinquency for Jose Cruz
11c—Family Court Docket Entries for Jose Cruz
11d—Final Order of Disposition for Jose Cruz

12a—Transcript of Detention Hearing, December 13, 1977, *Matter of Edwin Rodriguez, et al.*, Bronx Docket No. D3887/77
12b—Petition of Delinquency for Edwin Rodriguez
12c—Family Court Docket Entries for Edwin Rodriguez
12d—Final Order of Disposition for Edwin Rodriguez
12e—Petition of Delinquency for Edwin Ascencio, D3888/77
12f—Family Court Docket Entries for Edwin Asencio
12g—Final Order of Disposition for Edwin Asencio

13a—Transcript of Detention Hearing, April 12, 1978, *Matter of Juan Santiago*, Bronx Docket No. D1221/78
13b—Petition of Delinquency for Juan Santiago
13c—Family Court Docket Entries for Juan Santiago
13d—Final Order of Disposition for Juan Santiago

Stipulation and Order
(Exhibits' List—Petitioners)

14a—Transcript of Detention Hearing, July 5, 1978, *Matter of James Peebles*, Kings Docket No. D3701/78
14b—Petition of Delinquency for James Peebles
14c—Family Court Docket Entries for James Peebles
14d—Final Order of Disposition for James Peebles

15a—Transcript of Detention Hearing, May 24, 1978, *Matter of Jeffrey McCain*, Bronx Docket No. D1767/78
15b—Petition of Delinquency for Jeffrey McCain
15c—Family Court Docket Entries for Jeffrey McCain
15d—Final Order of Disposition for Jeffrey McCain

16a—Transcript of Detention Hearing, March 17, 1977, *Matter of Carl Harris, et al.*, Kings Docket No. D1615/77
16b—Petition of Delinquency for Carl Harris
16c—Family Court Docket Entries for Carl Harris
16d—Final Order of Disposition for Carl Harris
16e—Petition of Delinquency for Michael Taylor, D1614/77
16f—Family Court Docket Entries for Michael Taylor
16g—Final Order of Disposition for Michael Taylor

17a—Transcript of Hearing, July 13, 1977, *Matter of Victor Melendez*, Kings Docket No. D4319/77
17b—Petition of Delinquency for Victor Melendez
17c—Family Court Docket Entries for Victor Melendez
17d—Final Order of Disposition for Victor Melendez

18a—Transcript of Detention Hearing, December 1, 1976, *Matter of Tyrone Parson*, Kings Docket No. D9000/76
18b—Petition of Delinquency for Tyrone Parson
18c—Family Court Docket Entries for Tyrone Parson
18d—Final Order of Disposition for Tyrone Parson

19a—Transcript of Detention Hearing, March 5, 1976, *Matter of Geraldo Delgado*, Bronx Docket No. D802/76
19b—Petition of Delinquency for Geraldo Delgado

Stipulation and Order
(Exhibits' List—Petitioners)

19c—Family Court Docket Entries for Geraldo Delgado
19d—Final Order of Disposition for Geraldo Delgado

20a—Transcript of Detention Hearing, October 27, 1977, *Matter of Tony Gomez,* Bronx Docket No. D3342/77
20b—Petition of Delinquency for Tony Gomez
20c—Family Court Docket Entries for Tony Gomez
20d—Final Order of Disposition for Tony Gomez

21a—Transcript of Detention Hearing, July 23, 1976, *Matter of Maurice Dunaway,* Kings Docket No. D5936/76
21b—Petition of Delinquency for Maurice Dunaway
21c—Family Court Docket Entries for Maurice Dunaway
21d—Final Order of Disposition for Maurice Dunaway

22a—Transcript of Detention Hearing, May 3, 1977, *Matter of Daniel Nelson,* Kings Docket No. D2697/77
22b—Petition of Delinquency for Daniel Nelson
22c—Family Court Docket Entries for Daniel Nelson
22d—Final Order of Disposition for Daniel Nelson

23a—Transcript of Detention Hearing, September 20, 1977, *Matter of Daniel Gregoire,* Kings Docket No. D5481/77
23b—Petition of Delinquency for Daniel Gregoire
23c—Family Court Docket Entries for Daniel Gregoire
23d—Final Order of Disposition for Daniel Gregoire

24a—Transcript of Detention Hearing, August 31, 1977, *Matter of Carlos Lopez,* Kings Docket No. D5166/77
24b—Petition of Delinquency for Carlos Lopez
24c—Family Court Docket Entries for Carlos Lopez
24d—Final Order of Disposition for Carlos Lopez

25a—Transcript of Detention Hearing, June 1, 1979, *Matter of Kevin West,* Bronx Docket No. D2066/79
25b—Petition of Delinquency for Kevin West
25c—Family Court Docket Entries for Kevin West
25d—Final Order of Disposition for Kevin West

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(Exhibits' List—Petitioners)

26a—Transcript of Detention Hearing, June 6, 1979, *Matter of Carlos Fargas*, Bronx Docket No. D2112/79
26b—Petition of Delinquency for Carlos Fargas
26c—Family Court Docket Entries for Carlos Fargas

27a—Transcript of Detention Hearing, June 1, 1979, *Matter of Jody Allen*, Kings Docket No. D3373/79
27b—Petition of Delinquency for Jody Allen
27c—Family Court Docket Entries for Jody Allen
27d—Final Order of Disposition for Jody Allen

28a—Transcript of Detention Hearing, May 31, 1979, *Matter of Emmett Jacobs*, Richmond Docket No. D333/79
28b—Petition of Delinquency for Emmett Jacobs
28c—Family Court Docket Entries for Emmett Jacobs
28d—Final Order of Disposition for Emmett Jacobs

29 —Withdrawn

30 —Affidavits by L. Kevin Sheridan and Herbert Sturz in *People ex rel. Dale* v. *Davis*, Court of Appeals, State of New York

31a-
31j —Photographs of Spofford Detention Center

32 —Mayor's Task Force on Spofford—First Report, June 1978

33 —Report of the Governor from Kevin M. Cahill, M.D., Special Assistant to the Governor on Health Affairs —Governor's Panel on Juvenile Violence, January 1976.

34 —Withdrawn

35a—Transcript of Detention Hearing, Aug. 21, 1979, *Matter of James Ancrum*, Bronx Docket No. D27971/79
35b—Criminal Court Felony Complaint for James Ancrum, Bronx Docket X-923711

Stipulation and Order
(Exhibits' List—Petitioners)

35c—Order of Removal to Family Court for James Ancrum
35d—Family Court Docket Entries for James Ancrum
35e—Final Order of Disposition for James Ancrum

36 —Juvenile Detention in New York State, 1977, Policy and Practice—Final Report—New York State Division for Youth, Detention Study Unit

37 —New York State Division for Youth Detention System Admission/Release Statistics 1/1/79 to 12/31/79

38 —Excerpts of Twenty-third Annual Report, 1978, The Administrative Board of the Judicial Conference, The Judicial Conference and the Office of Court Administration—State of New York (March, 1978)

39 —New York City Department of Juvenile Justice Monthly Population Report for Spofford Juvenile Center, January, 1980

40 —Curriculum Vitae of Leslie T. Wilkins

41 —Curriculum of L. David Zinn, M.D.

42 —Transcript of Detention Hearing, February 29, 1980, *Matter of Ramon Ramos,* Kings Docket No. D1356/80

43a—Transcript of Detention Hearing, July 7, 1978, *Matter of Douglas McLaughlin,* Kings Docket No. D3773/78
43b—Family Court Order Dismissing Petition for Douglas McLaughlin
43c—Petition of Delinquency for Douglas McLaughlin
43d—Family Court Docket Entries for Douglas McLaughlin

44 —Family Court Disposition Study, First Draft—Vera Institute of Justice

Stipulation and Order (Exhibits' List—State)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

[TITLE OMITTED IN PRINTING.]

TRIAL EXHIBITS FOR THE ATTORNEY GENERAL, PRO SE*[†]

A	Issues Paper on Juvenile Detention, Vera Institute of Justice (July 17, 1979)
B1	Spofford Juvenile Center Detention Screening Form
B2	Court Assessment Unit Detention Screening Form
C	Court Assignment [Assessment] Unit Procedures —Guidelines
D	Withdrawn
E1-23	Photographs of Monroe County Children's Center (Oct. 10, 1978) and Affidavit of Authenticity
**F	M.A. McDiarmid, "Juvenile Pre-Trial Detention", XXXIV (3) National Legal Aid and Defender Association Briefcase 77 (Apr.-May 1977)

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* For purposes of post-trial submissions all exhibits offered by the Attorney General, *Pro Se*, are designated, "State's Exhibit —" or "SX —", rather than "Defendant's Exhibit —" or "DX —", to reflect the Attorney General's status as an intervenor in support of the constitutionality of New York Family Court Act § 739(a)(ii), rather than as a party defendant or respondent.

[†] The Attorney General's trial exhibits are included in Document Number 26 of the Record on Appeal. They are marked as shown on the following list and are in sequence.—*Ed.*

** SX F is offered for the proof of the facts state therein and not for the opinions and/or conclusions of the author.

G id. Secure Detention of Juveniles and Alternatives to Its Use, Series A Number 18 Phase 1 Report, p. 2, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, United States Department of Justice (Aug. 1977)

H Non-Secure Detention Facilities in New York City (Oct. 15, 1979)

I Guide for Preparing Court Assessment Unit Screening Form

J There is no Exhibit J.

K (Draft) Spofford Juvenile Center Detention Screening Procedures Manual (Vera Institute)

L Outline of Interview with Child and Conversation with Parent or Guardian, Spofford Juvenile Center Detention Screening Unit (Vera Institute)

M Connecticut Practice Book Sec. 1030, Superior Court Juvenile Detention Standard

N Connecticut Public Act No. 79851 (Jan. 1979)

O 1979 Admission and Release Statistics, Non-New York City Secure Facilities

- O1 Ethnicity Totals, Admission Authority and Admission/Release by County
- O2 Crimes
- O3 Release Statistics

P 1979 Admission and Release Statistics, Non-New York City Non-Secure Facilities

- P1 Ethnicity Totals, Admission Authority and Admission/Release by County

P2 Crimes

P3 Release Statistics

Q 1979 Admission and Release Statistics, New York City Secure Facilities

Q1 Ethnicity Totals, Admission Authority and Admission/Release by County

Q2 Crimes

Q3 Release Statistics

R 1979 Admission and Release Statistics, New York City Non-Secure Facilities

R1 Ethnicity Totals, Admission Authority and Admission/Release by County

R2 Crimes

R3 Release Statistics

S Table 48, General Characteristics by Race for Urban and Rural Residence, 1970 United States Census

T Order in *Martarella* v. *Kelly*, 71 Civ. 3159 (MEL) (SDNY 1975)

Nos. 82-1248, 82-1278

Office-Supreme Court, U.S.
FILED
MAR 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

—v.—

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly stated.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

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National Council on Crime and Delinquency, Correction in the United States, 13 Crime and Delinquency 11 (1967)..... 42

Wolfgang, Figlio and Selkin, Delinquency in a Birth Cohort, (1972)..... 41

Nos. 82-1248, 82-1278

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant

v.

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

MOTION TO AFFIRM

Appellees respectfully move, pursuant to Sup. Ct. Rule 16.1(c) that the Court

summarily affirm the judgment below on the ground that no substantial federal questions requiring further development or oral argument are presented since the judgment, based on affirmed findings of fact after an extensive trial record, is manifestly correct.

STATEMENT

By statute, New York Family Court judges are empowered to detain, without bail, any accused juvenile delinquent found by the judge to be at risk of not returning to court for trial if released. New York Family Court Act (F.C.A.) § 739(a)(i). By a different statute, Family Court judges are also empowered to detain juveniles whenever "there is a serious risk that [the juvenile] may before the return date do an act which if committed

by an adult would constitute a crime." F.C.A. § 739(a)(ii). Only the latter provision is at issue in this case. Although broadly stated this case questions the constitutionality of preventive detention per se, in fact the case may be viewed as considerably narrower in scope.

This suit was filed in 1977 as a class-action writ of habeas corpus. After a bench trial at which extensive evidence was adduced, the district court declared the statute unconstitutional on several grounds. (App. 32a-88a,[1] 513 F.Supp. 691).

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[1]Citations in this form refer to the Appendices to the Jurisdictional Statements filed herein. Additionally, the transcript of the trial in the district court, included in the Joint Appendices filed in the Court of Appeals, will be denoted "T. , Joint App. ".

On appeal, a panel of the Second Circuit unanimously affirmed in an extremely narrow opinion. (App. 1a-22a, 689 F.2d 365). The decision was "strictly limited to the precise issue before" the court. (App. 21a). The panel held "only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively and procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt." Id. The panel expressly intimated "no view as to the Constitutionality of preventive detention in other circumstances." Id.

The procedural history and factual context of this case have been adequately presented in the Jurisdictional Statement

of Appellant Schall and will not be reiterated. However, in view of Intervenor-Appellant's numerous distortions of the record and erroneous statements of fact not found by either the district court or the Court of Appeals, the courts' salient findings relevant to appellees' motion are set forth below.

The Court of Appeals found "facial incongruities" in New York's statutory scheme which "yield a paradoxical result in practice." (App. 7a,8a).

First, the court noted that F.C.A. §739(a)(ii) is not limited to "felonies or violent crimes", but authorizes detention based upon a finding that a juvenile may commit any act between petition and fact-finding "which constitutes a crime under the New York Penal Law"

(App. 7a).[2]

Second, the statute provides no substantive criteria, such as requiring recent, previous convictions for similar offenses, which would serve to guide the Family Court judge, other than the conclusory "serious risk" test. (App. 7a-8a).

Third, the statutory scheme lacks procedural safeguards including any standard of proof, finding of probable cause, or degree of probability of conviction as a condition of ordering detention. (Id.)

The "paradoxical result" identified by the court, is that "the vast majority

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[2]This places New York's statute in sharp contrast to the District of Columbia statute, D.C. Code 1973, §23-1322, which was upheld in United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), cert. denied sub nom. Edwards v. United States, 455 U.S. 1022 (1982).

of juveniles considered sufficiently dangerous by the Family Court to justify pre-trial incarceration...are in fact released by prosecutors or by the Family Court within days or weeks." (App. 10a).

In his concurring opinion, Judge Newman re-emphasized the narrowness of the Court's decision: "All members of the panel are in agreement that, even if the constitution permits preventive detention of those not yet found to have violated adult penal statutes or juvenile delinquency laws, this New York provision" is nonetheless unconstitutional. (App. 22a-23a). In Judge Newman's view, the statute is unconstitutional because "it permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion." (App. 24a).

Judge Newman identified five particular deficiencies in the statutory scheme (App. 27a-28a):

> First, the statute places no limits on the crimes for which the person subject to detention has been arrested...Second, the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused... Third, the judge is not required to assess the individual's background ...Fourth, the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released ...Fifth, the statute does not specify any standard of proof by which the judge must be persuaded of a serious risk of future crime.

The panel concluded that § 739(a)(ii) is "unconstitutional as to all juveniles." (App. 20a). At the same time, Judge Newman, in his concurring opinion, found the statute unconstitutional, not so much because of the actual numbers of wrongfully detained juveniles, but because the dearth of safeguards "needlessly creates an unnacceptable risk of such results." (App. 24a). These seeming-

ly disparate conclusions actually are complementary, both deriving from the facts adduced at trial as found by the district court.

1. Ostensible and Actual Legislative Purposes of F.C.A. § 739(a)(ii)

The express legislative purpose of § 739(a)(ii), is "crime prevention" (App. 10a, 26a, 63a).[3] It was as a crime prevention or preventive detention statute, therefore, that the statute was evaluated and found defective by the courts below.

The Court of Appeals stressed that in making § 739(a)(ii) determinations, unlike ultimate dispositional orders, Family

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[3] Intervenor-Appellant disingenuously implies that humanitarian concern for the juvenile is one of the purposes as well. (Juris. Statement at 22). Intervenor-Appellant ignores the testimony of his own witness, Judge Cesar Quinones, as relied upon and quoted extensively by the Court of Appeals (App. 11a-12a).

Court judges "emphasize matters going solely to the protection of the community." (App. 11a). The Court relied upon undisputed testimony by Intervenor-Appellant's witness, Family Court Judge Cesar Quinones (App. 11a, n.24):

> I believe that the purpose of 739(a)(ii) is really protection of the community. I believe that's the basic purpose for that provision.

The unanimous conclusion of the Court of Appeals constituted an affirmance of the finding of the district court that (App. 63a):

> This provision [§739(a)(ii)] seems to lack the high-minded purpose of protecting the juvenile which is the objective generally cited to justify deviations from adult standards in the juvenile justice system. Rather, the purpose seems to be to protect society from the juvenile.

Contrary to Intervenor-Appellant's contention (Jurisdictional Statement, at 17, 19), the Court of Appeals did not reach the issue of whether this asserted community protection purpose might be constitutionally permissible in other circumstances.[4] Such a broad-

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[4]In fact, far from approving community protection as a permissible purpose, Judge Newman, in his concurring opinion stated,

> It is arguable that, with respect to those accused of crime, pretrial detention imposed solely for the purposes of preventing the commission of future crimes prior to trial is punishment. With respect to those convicted of crime, the imposition of added confinement, beyond the penalties for the specific offense, is nonetheless punishment despite the prospective purpose of preventing future harm. [Citation omitted]. The extension of that principle to those accused of crimes raises the broad issue of whether pretrial detention to prevent future crime is ever permissible, an issue that need not be faced in deciding this case. For purposes of this appeal, I am willing to assume that (footnote continued)

based determination was unnecessary because of the court's conclusion that, in actuality, "739(a)(ii) is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts." (App. 17a).

The panel's conclusion that §739(a)(ii) remands are in actuality imposed as punishment derived from its findings that: (1) a large number of juveniles were detained despite evidence so "weak or insufficient" that they were ultimately never adjudicated; (2) many juveniles detained were mistakenly deemed to be dangerous in the "summary hearing" held under § 739(a)(ii) but upon adjudication were released to the community; and (3) many juveniles detained were released upon

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(footnote continued)
pretrial detention ordered for the purpose of preventing future crime serves a regulatory purpose. (App. 23a, n.1)[Emphasis in original].

disposition by the Family Court because "the time served, including the preventive detention period, is frequently considered sufficient punishment." (App. 13a, 17a-18a). The court found no compelling interest to justify detention as to any of these groups and held as to the latter (App. 18a):

> [D]etention serves the purpose of punishment rather than crime prevention, since early release -within days or at most a few weeks - by a Family Court Judge contradicts any asserted need for pretrial confinement to protect the community.

Moreover, the lack of procedural safeguards to ensure that detention would not be imposed improperly or beyond that which would be necessary to satisfy its ostensible crime prevention purpose further demonstrates the actual punitive nature of the statute (App. 19a):

> Section 739(a)(ii) thus incarcerates punishes - large numbers of persons upon a standard of proof which is constitutionally invalid and which cannot be justified in the name of crime prevention.

Finally, the record clearly shows that pretrial detention under § 739(a)(ii) can be seriously harmful to juveniles:

> Juveniles detained under 739(a)(ii) may be held in a secure facility and exposed to assault and criminal subcultures.

(App. 13a-14a)[Footnote omitted]. The court relied upon the testimony of Judge Quinones:

> In my opinion, all defenses [sic: detentions], juvenile or adult, can have bad effects. For one thing, we are talking about youngsters of tender age. You are taking them away from their family. I mean, that's bound to have a psychological ...detrimental effect on them.
>
> * * *
>
> Then again juvenile center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you

> are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse then they possibly might be and it might have a bad effect in that respect.

(App. 12a, n.24; 14a, n.29)[citations omitted.].

Likewise, the district court found that detention "stigmatizes the youthful detainee in a way that associates him with criminal behavior." (App. 84a). The court held (App. 83a):

> The burdens of pretrial detention are substantial to impose on a presumptively innocent man, even where there is probable cause to believe he has committed a crime. [Citation omitted]. To allow a state to impose these burdens on a juvenile before the state has taken the initial validating step of establishing its right to restrict the individual's liberty, in order to ensure his presence at trial, would seem to be at war with accept-

ed concepts of due process of law.[5]

2. Wrongful Detention Under F.C.A. §739(a)(ii)

Construing the evidence adduced at trial most favorably to Appellant and Intervenor-Appellant, the Court of Appeals found that (App. 9a):

> [O]ne critical fact has been established--the vast majority of juveniles detained under §739(a)(ii) either have their petitions dismissed before an adjudication of delinquency or are released after adjudication.

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[5] The "burdens of pretrial incarceration were spelled out quite clearly at trial, particularly in the testimony of Dr. Lynwood, David Zinn and Steven Hiltz, Esq. These inc lude: prejudice in the trial process, an increase in the chance that the child will be placed away from home, psychological and emotional damage, problems with schooling, exposure to violence, and alienation from family. (T. 31-34, 36, 96-9, 236, 256-7, 260, 396-9, 401-3, 480; Joint App. 209-212, 214, 255-8, 331-2, 348-9, 352, 482-5, 487-9, 566).

The court relied upon a study prepared by the Vera Institute of Justice which established two patterns: (a) of detained juveniles, "49% have their cases dismissed before trial, 21% are dismissed or released after trial, and only 30% are restrictively placed";[6] and (b) the pretrial detention rate (one third of all delinquency petitions) is far higher than the restrictive placement rate (11% of all petitions).[7]

Additionally, the Court of Appeals noted similar trends among the thirty-four case histories presented by appellees

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[6]Contrary to Intervenor-Appellant's contention, the court clearly used the term "restrictively placed" as the term is commonly understood, not in the highly technical sense to include only "designated felony" placements under F.C.A. §753-a.

[7]It should be noted that the record below also included data from the New York State Division for Youth to like effect. (Joint App. 1311, 1321, 1130, 1338).

through exhibits and testimony at trial.[8] These case histories concerned only youths detained under § 739(a)(ii) and were found by the district court to reveal "arbitrary and capricious action in its crudest and rawest form". (App. 79a). [Emphasis

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[8] Intervenor-Appellant's summary of this evidence as it related to the named plaintiffs and those who testified at trial was replete with errors, hearsay, and facts not found by the courts below. Without burdening this Court with a refutation of each of these mistatements at this time, a few examples will suffice. The record does not indicate Juan Santiago had a "dagger"; nor did it "establish" that he had committed similar, previously unreported crimes (Joint App. 939-940, 943). The statement regarding Kenneth Morgan was simply third degree hearsay, not reliable evidence. (Joint App. 791). Far from establishing the prosecutor's reasons for terminating Luis Rosario's case, the record is completely silent. Moreover, Intervenor-Appellant's assertion as to the extent of prior record of Rosario and Morgan was incorrect. (Joint App. 792; Petition's Exhibits 2,3).

supplied]. While the sample is concededly too small for precise statistical conclusions to be drawn, the same generalized trends emerged as described above. The representativeness of these case histories was never challenged by appellants (App. 10a, n.19) and, in fact, undisputed testimony by Steven Hiltz established that the cases were quite typical (T. 24, Joint App. 202).

Although appellants continue to dispute the conclusions drawn from this data, the Court of Appeals noted (App. 9a):

> Although the defendants have superior access to generalized statistics and at least an equal opportunity to present a counter-sample of case studies, they chose to rely solely upon the most vulnerable data in the record.

3. Lack of Prescribed Standards

The high number of wrongful detentions noted above derives in large measure from the lack of uniform criteria for rendering determinations under § 739(a)(ii). All juveniles arrested may be considered for detention, regardless of the offense with which they are charged and regardless of their prior record, even if they have never before been arrested.

All three members of the panel and the district court found that the procedurally and substantively unlimited terms of the statute provide unfettered discretion to the Family Court judge to order pretrial detention. (App. 7a-8a, 18a, 20a, 21a, 24a, 27a, 28a, 29a, 53a, 54a, 65a, 66a, 67a, 79a).

The Court of Appeals held that Family Court judges generally consider

certain factors ostensibly related to crime prevention. (App. 11a). Contrary to the assertions of both appellants, beyond these broad considerations, there are no specific uniform criteria considered by all Family Court judges in deciding whether or not to order detention.[9]

As the district court found (App. 54a):

> No uniform court or judicial criteria, yardstick or guidelines govern a §739 disposition. In deciding whether the juveniles should be detained,

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[9]Neither Judge Quinones nor Judge Driscoll, the two judges testifying on behalf of Intervenor-Appellant, testified that the various criteria that they use in rendering detention determinations are identical to those utilized by other judges in their jurisdictions. Both limited their testimony to the factors they themselves consider. (T. 463, 465, 485, 657-60, 679-80; Joint App. 549, 551, 571, 718-21, 740-41). According to Judge Quinones: "I guess we all have our standards and we all have measures of determining in our own minds the seriousness of the allegations." (T. 465, Joint App. 551).

> each judge must rely on his own subjective judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute. (T. 435-513).

Examples of the result of such "unbridled discretion" (App. 29a, 66a) can be seen in some of the district court's unanimously affirmed findings (App. 67a):

> It is clear that the judge decides on pretrial detention for a variety of reasons--as a means of protecting the community, as the policy of the judge to remand (Exhibit 6a, p.3), as an express punitive device (Exhibit 42, p.11), or because of the serious nature of the charge. (Tr. 465. Exhibit 13a, p. 3), among others.

Further, the court found (App. 79a):

> Whether the juvenile was a first offender with no prior conduct, whether the court was advised that the juvenile was an obedient son or was needed at home, whether probation intake recommended

> parole, the case histories in this record disclose that it was not unusual for the court to discount these considerations and order remand based on a 5 to 15 minute evaluation.

See also App. 80-81a.

Finally, the trial court identified the category of detainees (including 16 of the 34 case histories) against whom application of F.C.A. §739(a)(ii) was most "pernicious" -i.e., detainees who had been released by police upon arrest to their parents or guardians, who had been allowed to stay home for "roughly five days to over a month prior to the §739 hearing" and who had committed no infractions during that period (App. 61, 79a-80a). The court noted as well numerous examples of remands for extremely minor crimes and for first offenders (App. 55a, 61a) -- youths who clearly would not have been detainable

under the District of Columbia statute at issue in U.S. Edwards, supra.

4. Inability to Predict Future Criminal Behavior

The ability of Family Court judges "correctly" to detain youths under § 739(a)(ii), in terms of meeting the purported goals of the statute, are impaired, not merely by the lack of uniform standards, but also by the primitive state of the art of crime prediction.

The inability to predict future criminal behavior has been well-documented and is well supported by the record and by the findings of the trial court (App. 68a-77a). As Judge Newman stated:

> The hazards of predicting human behavior are well known. They are not diminished when the issue is whether a person arrested for one crime will, in the interval prior to his trial, commit another crime. (App. 25a).

The district court relied upon the finding of appellees' expert, criminologist Leslie Wilkins, that:

> [H]e would be surprised if recommendations based on intake interviews were better than chance and assessed the judge's subjective prognosis about the probability of future crime as only 4% better than chance -virtually wholly unpredictable. (App. 68a).

Professor Wilkins observed that the shorter the period of risk -- in this case, the interval during which the child would be paroled pending trial --the more difficult and arbitrary the prediction (T. 332; Joint App. 408):

> [A]s [the base] rate drops, the likelihood, for example, of a person who has committed a violent crime, committing another violent crime in a given interval of time that probability really begins to get very, very small. So as you subdivide the groups or as you truncate time, so the percentage in the category you are looking for diminishes until you get to the proverbial needle in the haystack which not even statisticians can find.

Thus, the ability to predict crime commission during the period at risk in this case -- that is, a period of only a few days to five weeks (T. 462-463) -- is extremely small and is, in fact, no better than simply abstracting from the base rate (T. 343). In cases where there have not been any prior convictions, the probability of crime commission within such a short interval "would normally be extremely small indeed." (T. 344).[10] As the district court noted (App. 68a):

> He [Prof. Wilkins] testified that no method had yet been devised which could predict with any acceptable degree of accuracy that a juvenile shall commit a crime,

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[10] Intervenor-Appellant's assertion that Professor Wilkins established the peak rate of post-conviction recidivism to be approximately three months after release is patently false. Professor Wilkins testified that the rate of recidivism peaks somewhere between three and six or nine months after release (T. 332, Joint App. 418). (Emphasis supplied.)

particularly the commission of an offense in a short space of time, as the judge must do in making his § 739 decision.

For these reasons, the trial court concluded that appellees are deprived of pre-trial liberty based on "judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates." (App. 77a).

5. Inadequacies of Procedural Safeguards

The enormous risk of error in judicial determinations under § 739(a)(ii) is in no way mitigated by existing safeguards. There is no requirement that the state meet a prescribed burden of proof; nor is there any requirement to show a substantial probability of eventual conviction. Even probable cause to arrest need not be shown to detain preventively.

The hearing held under F.C.A. § 739 lasts only five to fifteen minutes, in practice, (App. 68a) and is quite perfunctory -- hardly the exhaustive inquiry implied by Intervenor-Appellant. As the Court of Appeals found, on the basis of the testimony of Judge Quinones, no testimony is typically taken from witnesses as to likelihood of guilt. Family Court judges simply have before them a petition, normally accompanied by an affidavit of accuracy, a recommendation by a probation representative who had not personally made the inquiries and statements by the child, his attorney and accompanying parent or other adult. (App. 10a-11a). The district court's findings that "often there is no one present with personal knowledge of what happened", that "no inquiry is made into the non-

hearsay allegations of the truth of the charges, and no testimony is taken under oath" are undisputed. (App. 53a, 54a).[11]

As the district court found, the probation recommendation relied upon by the Family Court is derived from a ten to forty minute interview conducted by an assigned probation officer. The child is not represented by counsel and "not subjected to any professional psychiatric or psychological examination unless mental health problems are patently evident." (App. 51a). The probation

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[11]Judge Quinones' testimony directly contradicts Intervenor-Appellant's statement that oral statements may be taken from complainants in lieu of affidavits:

> I don't see how that would happen, because if you had their presence, you would have the person sign the petition itself. I don't see how that would happen.

(T. 447, Joint App. 533).

officer "is not equipped to make any sophisticated or in depth evaluations of the charges or the child, particularly in light of time constraints." (App. 67a). In fact,

> There do not appear to be any governing criteria which must be followed by the probation officer in choosing between proposing detention and parole, nor do psychological or psychiatric factors appear to be considerations involved in the probation officers' recommendations. (App. 52a).

Moreover, counsel typically is assigned to the child just as the hearing begins. Thus, "he takes on responsibility for the proceedings only moments before convincing reasons must be presented to the court for not ordering pretrial detention." (App. 68a).

Finally, contrary to appellants' contentions, the statutory requirement that a statement of facts and reasons

accompany judicial determinations under Family Court Act § 739(a) does not overcome the lack of procedural and substantive protections described above. As the Court of Appeals found (App. 20a),

> Individual litigation ... is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined.

Likewise, the district court held that, although the Family Court judge "usually gives some indication on the record of his reasons for ordering pretrial detention," and although a stenographic record is made of the proceeding, "the judge is accorded total and unbridled discretion since effective review is not possible"

[citation omitted]. (App. 53a, 66a).[12]

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[12]The district court recognized that individual writs of habeas corpus are authorized, as in the case of People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682 (1976) cited by Intervenor-Appellant. However, the court found:

> The short span of pretrial detention makes effective review impossible. Detention is over before appellate review can be obtained. In New York ex rel. Wayburn v. Schupf and in this case, motions to dismiss on grounds of mootness were denied because to hold otherwise would have meant insulating § 739 from constitutional challenge. Nonetheless, in reality no juvenile ordered into pretrial detention can test the validity of his adjudication while he is being held in custody pursuant thereto.

(App. 66a, n. 29). [Emphasis supplied].

ARGUMENT

THE JUDGMENT BELOW SHOULD BE AFFIRMED SUMMARILY SINCE, GIVEN THE EXTENSIVE FACTUAL RECORD, UNANIMOUS FINDINGS OF FACTS, AND NARROWNESS OF THE DECISION BELOW, NO SUBSTANTIAL QUESTION WARRANTING PLENARY REVIEW IS PRESENTED IN THIS CASE.

1. The Juvenile's Interest In Pre-trial Liberty Is Substantial

The interest of appellees' class in their liberty is of "transcending value." Speiser v. Randall, 357 U.S. 513, 525 (1958). The most egregious form of deprivation of liberty is incarceration. Pretrial detention additionally, and unavoidably, deprives the detainee of other fundamental interests, including interference with preparation of charges for trial.

This Court has frequently recognized the significant interests juveniles possess to remain free from unlawful or wrongful deprivations of liberty. See In re Gault,

387 U.S. 1, 50 (1967); In re Winship, 397 U.S. 358 (1970); Breed v. Jones, 419 U.S. 894 (1975). The record in this case conclusively demonstrates that there are no special benefits to juveniles in detention to justify an otherwise questionable process. Cf. McKeiver v. Pensylvania, 403 U.S. 528 (1971). Perhaps best summarized by appellants' witness at trial, Commissioner Kelly, there are "detrimental consequences to institutionalization to most people and kids are no different." (T. 571; Joint App. 646).

The decision to detain before trial is an important one in any criminal justice system. The time between arraignment and trial has been recognized to be "perhaps the most critical period of the proceedings ... when consultation, thoroughgoing investigation and preparation ....

[are] vitally important." Powell v. Alabama, 287 U.S. 45, 57 (1932). Wrongful detention of juveniles is even worse than wrongful detention of adults, as this record demonstrates. Incarceration has the potential to traumatize children or to teach them the ways of crime. It can cause difficulties with school. It also increases the likelihood that the accused will be convicted. Finally, it increases the prospect that, once convicted, the juvenile will be sentenced to a restrictive placement.

For these reasons, and aware that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action," Greenholtz v. Inmates of the Nebraska Penal and Corectional Complex,

442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part), the panel below correctly required a compelling state interest to justify detaining appellees before trial. As the panel said (App. 16a):

> We believe all would agree, however, that any exception to the general rule that incarceration follow, rather than precede, adjudications of guilt can be justified, if at all, by a compelling governmental interest.

Based on the record at trial, the panel was unable to identify a sufficient governmental interest in detention since the overwhelming majority of those detained were released from custody (1) without being found guilty, (2) after a short period of detention, or (3) because they were detained, being regarded as having served time in confinement.

2. The Challenged Statutory Scheme Offends Due Process Clause of the Fourteenth Amendment.

a. The Statutory Scheme Imposes Punishment Before Trial.

Punishment before trial is antithetical to American constitutional law. It is a truism that in the United States every criminal justice system includes a "trial which the United States Constitution guarantees to any accused before he may be punished." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). Whether punishment inflicted by the state occurs in the criminal context or in any other context:

> [T]he state does not acquire the power to punish...until after it has acquired a formal adjudication of guilt in accordance with due process of law.

Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977). See also Bell v. Wolfish, 441 U.S. 520, 535 (1979); Speiser v. Randall, 357 U.S. at 525-26.

The special reasons the Court of Appeals found the statutory scheme to be unconstitutional are explained by the broad reach of the statute. The vast majority of juveniles detained under the statute are released within a short time because most never should have been detained in the first place. It is simply far too easy to be detained under the statute. These flaws in the scheme require affirmance of the judgment below without deciding whether a more tightly written and applied preventive detention law -- such as that reviewed in United States v. Edwards, supra -- may survive constitutional attack.

b. The Decision to Detain is Riddled With Subjectivity

There are no uniform standards for the decision to detain. As the record shows, one judge's "policy" is to detain

preventively all juveniles arrested and charged with possession of a weapon (Joint App. 821) The decision is based on the recommendation of a probation officer, after an interview which lasts from 10 to 40 minutes. The court appearance itself usually lasts five to fifteen minutes and, as the trial court found, the decision is made "for a variety of reasons -as a means of protecting the community, as the policy of the judge..., as an expressly punitive decree, or because of the serious nature of the charge." (App. 67) This undue degree of discretion accorded to Family Court judges offends due process of law. See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

c. The Statute is Overinclusive

Section 739(a)(ii) is overinclusive because it allows the incarceration of

persons under sixteen based on a prediction that, if released, they would commit any act equivalent to a crime, including shoplifting, joy riding or graffitti. As the record below demonstrates, many juveniles are detained preventively who have been accused of nothing more than a property crime, such as "stealing a pair of shorts" (Joint App. 883) or playing "three-card monte" (Joint App. 989).

Not only may juveniles accused of petty offenses be detained preventively in New York, they need never have been found guilty of any past wrongdoing. See Findings of the District Court, App. 60a-61a, 81a-82a. An important empirical study of juveniles indicates that a first offense, even a serious one, is predictive of neither the probability of, nor the seriousness of, future offenses over the

course of lifetime. Wolfgang, Figlio and Sellin, Delinquency in a Birth Cohort, 159-61 (1972). The study further found that the probability that a youth whose first offense involved personal injury would subsequently be arrested for another injury offense was less than ten per cent. Id. at 188.

Given the ease with which a juvenile may be detained under the challenged statute, it is no wonder that most are released from custody within a short time after they are found to be a serious risk to the community. Their detentions were arbitrary, capricious and wholly needless. The state's own evidence at trial showed that:

> (t)he great majority of the approximately 6000 juveniles who pass through the City's detention facilities each year return directly to the community on leaving detention.

Most of these are not placed under probation supervision.[13]

[State's Exhibit A (for identification), at 9-10.]

New York's scheme stands in sharp contrast to the preventive detention law challenged in United States v. Edwards, supra. First, under it, persons may be

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[13]This practice is apparently common in juvenile justice. A noted sociologist has observed that "the modern American strategy for correcting juveniles tends to rely on an emergent policy. The unstated policy is: offer more juvenile detention jailing than any other correctional response." Lerman, Discussion of 'Differential Selection of Juveniles for Detention,' Journal of Research in Crime and Delinquency 166, 168 (July 1977). Similarly, the National Counsel on Crime and Delinquency has declared: "Juvenile detention is frequently misused as an immediate punishment for delinquent acts. If punishment is the Court's only disposition, it ought to be administered only after the facts are in -- not as an immediate reaction to the charge." National Counsel on Crime and Delinquency, Correction in the United States, 13 Crime and Delinquency 11 (1967).

detained only if charged with a limited number of "crime(s) of violence." D.C. Code 1973, §23-1331(4). Second, the accused must have been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he is presently charged, or the crime of violence was allegedly committed while the accused was, with respect to another crime of violence, on bail or other release pending completion of a sentence. § 23-1322(a)(2). Third, detention may not be ordered unless there is (1) "clear and convincing" evidence that the accused is eligible for detention, (2) no condition of release will "reasonably assure" the safety of the community, and (3) a "substantial probability" that the accused is guilty of the offense. §§23-1322(a)(1,2), 1322(b).

In this case, undisputed evidence reveals that of those juveniles detained pre-trial in 1979, more than half (51%) were charged with offenses which would preclude entirely their eligibility for detention under the District of Columbia standard. [Supplement to Brief for Petitioners-Appellees in Court of Appeals (Table V)]. Without deciding whether crime prevention may occasionally justify pre-trial detention, it is clear that the state's interest in preventing petty offenses "is [not] great enough to justify such a massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). See also Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980). Protection of property is not so compelling a state interest to justify deprivation of liberty

before trial.[14]

New York's lack of proportionality and perspective, both with regard to the seriousness of the offense[15] and the prior record of the accused, largely explains the high number of juveniles who are ultimately released from detention. The state's purpose in detention is met once the juvenile has been detained for a short time. Rather than the purpose being protection of the community how-

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[14]An additional problem with the statute's reach to include misdemeanors and other non-violent crimes is Justice Powell's observation in Baldasar v. Illinois, 446 U.S. 222, 231 (1980): "No court can predict with confidence whether a misdemeanor defendant is likely to become a recidivist."

[15]The Vera study introduced at trial indicates that 33% of those charged with B misdemeanors, 24% of those charged with A misdemeanors and 41% of those charged with the lowest felony charge in New York -- E felonies -- are detained before trial. (J. App. 1265)

ever, it becomes, as the panel and the district court convincingly found, punishment. This offends basic notions of fairness and serves no legitimate state purpose.

The narrow holding of the panel "that pre-trial detention may not be imposed for anti-crime purposes...when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt" (App. 21a) is manifestly correct and should be affirmed summarily.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
March 22, 1983

Respectfully submitted,

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Nos. 82-1248, 82-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, as Attorney General of the State of New York,

Appellants,

-v.-

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLANT SCHALL

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August 9, 1983

Alden Press Corp., 138 Osborn Street, N. W. [illegible]

Question Presented

Section 320.5(3)(b) of the New York Family Court Act authorizes the pretrial detention of a juvenile upon the Family Court's statement of facts and reasons for finding that, unless the juvenile is detained, there is a serious risk that he may, before the return date of the fact-finding hearing (*i.e.*, trial), commit an act which, if committed by an adult, would constitute a crime. The question presented is:

Whether section 320.5(3)(b) comports with the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

Parties

This proceeding was originally commenced against the Director of Detention Services of the New York City Human Resources Administration, Robert K. Davis, the official then having custody of juvenile pretrial detainees. By stipulation of the parties, the Commissioner of the New York City Department of Juvenile Justice was substituted as respondent when that Department was given responsibility for those detainees. Ellen Schall formally assumed the position of Commissioner on January 20, 1983. She has therefore been substituted in the caption for the former Commissioner, Paul Strasburg, whose name appeared in the caption in the District Court and the Court of Appeals. *See* Rule 40.3 of the Rules of this Court.

The Attorney General of the State of New York, Robert Abrams, intervened in the District Court pursuant to his obligation to support the constitutionality of State statutes. New York Executive Law, § 71 (Book 18, McKinney's Consolidated Laws of New York).

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Nos. 82-1248, 82-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, as Attorney General of the State of New York,

Appellants,

-v.-

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF FOR APPELLANT SCHALL

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, which is reprinted in the Joint Appendix at page 95, is reported *sub. nom. Martin* v. *Strasburg* at 689 F. 2d 365. The concurring opinion of Circuit Judge Newman is reprinted in the Appendix at page 116 and appears in the reporter at 689 F. 2d 375.

The opinion of the United States District Court for the Southern District of New York (Carter, D. J.), which is reprinted in the Appendix at page 36 is reported *sub. nom. United States ex rel. Martin* v. *Strasburg* at 513 F. Supp. 681. An earlier decision of the District Court denying a motion to dismiss for failure to exhaust administrative remedies and certifying the matter as a class action, which is dated April 3, 1978 and appears in the Appendix at page 20, is unreported.

Jurisdiction

The judgment of the United States Court of Appeals was entered on September 20, 1982. A timely notice of appeal to this Court was filed in the Court of Appeals on behalf of the Commissioner of the New York City Department of Juvenile Justice on December 8, 1982. Pursuant to an order of Justice Marshall, dated December 10, 1982, granting an extension of time to docket the appeal, appellant Schall's jurisdictional statement was timely filed, and the appeal was docketed, on January 24, 1983.[1] Probable jurisdiction was noted by this Court on April 18, 1983, and this case

[1] Justice Marshall's order granted an extension of time to January 23, 1983, a Sunday. Appellant Schall's jurisdictional statement was served and mailed to the Court on the following Monday, January 24.

was consolidated with case no. 82-1278, *Robert Abrams, as Attorney General of the State of New York* v. *Gregory Martin, et al.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C., section 1254(2).

Statute Involved

New York Family Court Act, section 320.5 (McKinney's Consolidated Laws of New York—Interim Annotation Service, April 1983)[2]

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[2] Petitioners' challenge was to the constitutionality of section 739(a)(ii) of the New York Family Court Act, which, at the time of the commencement of this proceeding, was the statute governing the pretrial release or detention of both alleged juvenile delinquents and persons in need of supervision. However, on December 20, 1982, the Governor of the State of New York signed a bill amending the Family Court Act. L. 1982, ch. 920, as amended. The new statute, which became effective on July 1, 1983, established a new Article 3 of the Act, denominated "Juvenile Delinquency". The provisions of Article 3 are applicable, *inter alia*, to "all juvenile delinquency actions and proceedings commenced upon or after the effective date thereof and all appeals and other post-judgment proceedings relating or attaching thereto" and "all juvenile delinquency actions and proceedings commenced prior to the effective date thereof but still pending on such date". FCA, § 301.3(1)(a) and (2)(a). Article 7, which, until July 1, governed both delinquency proceedings and proceedings concerning persons in need of supervision, now covers only the latter. Former section 739(a)(ii) is set out in appellant Schall's jurisdictional statement, pages four through six, to which the Court is respectfully referred.

The new Article contains a preventive detention section identical to former section 739(a)(ii). As a comparison of the two sections demonstrates, the relevant standard for detention, "serious risk that the respondent may before the return date commit an act which if committed by an adult would constitute a crime," remains the same. The issue of mootness is discussed in subpoint I of the Argument.

§ 320.5. The initial appearance; release or detention

1. At the initial appearance,[3] the court in its discretion may release the respondent or direct his detention.

• • •

3. The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:

(a) there is a substantial probability that he will not appear in court on the return date; or

(b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.

Statement of the Case

Proceedings Below

This proceeding was commenced in the United States District Court for the Southern District of New York by three juveniles (hereinafter, "the petitioners"),[4] on behalf

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[3] Section 320.1 of the Family Court Act defines "initial appearance" as "the proceeding on the date the respondent first appears before the court after a petition has been filed and any adjournments thereof".

[4] Appellees in this Court.

The original petition was filed on December 21, 1977 on behalf of Gregory Martin and the class he sought to represent. At that time, Gregory was being detained pursuant to section 739(a)(ii) following a "section 739 hearing" held on December 14, 1977. Probable cause had been found at a hearing on December 19, 1977. After a fact-finding hearing on December 27 through 29,

(Footnote continued on following page)

of themselves and all others similarly situated, for a writ of habeas corpus and a declaratory judgment. Jurisdiction was invoked under 28 U.S.C., sections 2241 *et seq.* and 2254; 28 U.S.C., section 2201; and Rule 57 of the Federal Rules of Civil Procedure (JA: 9).[5] Petitioners alleged that, since section 739(a)(ii) of the New York Family Court Act (hereinafter, "FCA") violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, their pretrial detentions pursuant to that statute were unlawful.

In an opinion and order dated April 3, 1978, the District Court, on petitioners' motion, certified the action as a class action, defining the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under §739(a)(ii) of the [Family Court] Act" (JA: 32). Following a trial on the merits,[6]

(Footnote continued from preceding page)

1977, Gregory was found guilty of all acts charged; at the conclusion of his dispositional hearing on February 14, 1978, he was placed on probation for two years. In an amended petition dated March 31, 1978, Luis Rosario and Kenneth Morgan, two juveniles then being detained pursuant to section 739(a)(ii), were added as named petitioners. The District Court certified the class in an opinion and order dated April 3, 1978 (Joint Appendix: pp. 30-32). *See Gerstein* v. *Pugh*, 420 U.S. 103, 110 n. 11 (1975); *see also United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 397-401 (1980).

[5] Page numbers preceded by "JA" are references to pages of the Joint Appendix filed on this appeal.

[6] In this regard, the Court is respectfully referred to the Statement of the Case in the brief of the appellant Attorney General of the State of New York, submitted on the companion appeal, *Abrams* v. *Martin*, no. 82-1278 (hereinafter, "the Attorney General's brief").

the District Court, in a judgment entered June 1, 1981, declared FCA, section 739(a)(ii), "unconstitutional, both on its face and as applied, in that it contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States". The Court also granted writs of habeas corpus, ordering that "all members in [the Commissioner's] custody pursuant to Family Court Act Section 739(a)(ii) shall be released forthwith" (JA: 93).[7]

In its opinion, the District Court concluded that petitioners' equal protection challenge to the statute was "insubstantial" (JA: 67). The Court, however, did find that FCA, section 739(a)(ii), violated the Due Process Clause of the Fourteenth Amendment in three particular respects. The "most pernicious" defect in the statute, the Court concluded, was the fact that, while it empowered judges to make predictions about the probability of an individual committing a crime if released, it provided no guidelines for making that determination. "The judge's determination is moored to no concrete or reasonably determinable yardsticks.... The whole process is riddled with subjectivity and caprice and confers upon the judge 'a license for arbitrary procedure'" (JA: 69-70). The predictions involved in bail and sentencing proceedings were distinguished by the Court on the ground that the courts in those situations made the determinations upon "all possible relevant information about the defendant" (JA: 82). On the other hand, the Court found, a Family Court judge making a determination under section 739(a)(ii) "operate[d] on intuition and his personal predilections, the antithesis of rea-

[7] In a post-judgment clarifying memorandum to all counsel, the District Court explained that "[the] writ reaches all detained juveniles held under the relevant act until this proceeding is concluded or the judgment entered is reversed" (JA: 94).

soned action" (JA: 83). Thus, juveniles who were detained under section 739(a)(ii) "ha[d] their freedom curtailed by judgments that [were] untrustworthy and uninformed and without the requisite rationality which due process mandates" (JA: 81).

Second, the District Court held that "pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process" (JA: 69). Finally, section 739(a)(ii) was constitutionally defective since it permitted the imposition of punishment prior to an adjudication of guilt (JA: 88). The Court found that the section's purpose, the protection of society from juveniles' criminal conduct, was not sufficiently distinguishable from the purposes of the juvenile justice system as a whole to constitute an "alternative purpose" under *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). Even assuming the adequacy of the alternative purpose, "the inability of trial judges to predict which juveniles will commit crimes ... means that any given decision to detain cannot 'rationally be connected' with the purpose behind it" (JA: 90). The Court also determined that "the stigmatizing of juveniles as prospective or habitual criminals prior to trial is such a departure from basic principles of due process that it 'appears excessive' even in relation to the goal of protecting society" (JA: 90).

Upon the appeals of the Commissioner and the Attorney General to the Court of Appeals, only the District Court's finding that FCA, section 739(a)(ii), violated the Due Process Clause was presented for review.[8] "[I]ntimat[ing] no view as to the constitutionality of preventive detention in

[8] Petitioners' equal protection claim, which, as noted, was rejected by the District Court, was neither raised in, nor decided by, the Court of Appeals.

other circumstances" (JA: 114), the Court of Appeals held that "the statutory scheme and practice under it violate[d] the Due Process Clause of the Fourteenth Amendment" (JA: 97) since section 739(a)(ii) "[was] utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts" (JA: 111).

Finding that over two-thirds of the detainees under section 739(a)(ii) were either "not ... adjudicated guilty or [were] not ... sentenced to confinement after an adjudication of guilt" (JA: 114), the Court determined that the statute had "an unconstitutional impact as to the vast majority of the juveniles detained under it" (JA: 113) since such detentions "involve[d] either mistakes in judgment fostered by 739(a)(ii)'s procedurally and substantively unlimited terms or the imposition of incarceration solely as punishment for unadjudicated crimes" (JA: 112). The Court thus concluded that, as to this "vast majority", "[c]rime prevention simply [did] not provide justification for the[ir] detention" (JA: 111). Having so found, the Court held that FCA, section 739(a)(ii), was unconstitutional as to all juveniles (JA: 113).

Judge Newman, concurring only in the result, was "less certain than the majority that the record supports a conclusion of a significant number of instances where detention was imposed either mistakenly or for purposes of punishment" (JA: 117). In Judge Newman's view, "the statute denies due process ... not because it has been shown to yield an unacceptable number of mistaken or impermissible results, but simply because it needlessly creates an unacceptable risk of such results" (JA: 117-18).

Utilizing a "[t]raditional due process analysis" (JA: 118) (*see Mathews* v. *Eldridge*, 424 U.S. 319 [1976]), Judge Newman found that the private interest impaired by sec-

tion 739(a)(ii), *i.e.*, personal liberty, "was of fundamental importance" (JA: 118), and that the governmental interest involved, *i.e.*, the prevention of crime, was "of great significance" (JA: 118). The Judge then noted that "the uncertainty in determining whether [a person's] pre-trial detention advances a governmental interest arises from the difficulty of predicting whether he would have committed a crime if not detained, or assessing at least the probability of his doing so" (JA: 119). Turning, then, to the third due process factor, "the risk of an erroneous deprivation and the probable value of safeguards" (JA: 119), Judge Newman concluded that section 739(a)(ii) "[did] not include readily available limitations that would reduce the risk of error" (JA: 121). The Judge listed five such limitations (JA: 121-22):

> "First, the statute places no limits on the crimes for which the person subject to detention has been arrested.... Second, the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused.... Third, the judge is not required to assess the individual's background .... Fourth, the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released.... Fifth, the statute does not specify any standard of proof by which the judge must be persuaded of a serious risk of future crime."

Brief Summary of Statutory Scheme (New York Family Court Act, Article 3—Juvenile Delinquency)[9]

A child in New York under the age of 16 may be taken into custody without a warrant by a peace officer or a police officer in cases in which an adult may be arrested for a crime. FCA, § 305.2(2); *see also* FCA, § 305.1.[10] Upon taking a child into custody, the officer must immediately notify the parent or other person legally responsible for the child's care, or, if such legally responsible person is unavailable, the person with whom the child resides,[11] that the child has been taken into custody. FCA, § 305.2(3). While release of the child to his parents is preferred (FCA, § 305.2[6]; *see* § 305.2[4][a]), if "special circumstances" are present (FCA, § 305.2[6]), the child may be taken directly to Family Court or to a juvenile detention facility, or

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[9] The procedures prescribed by the new Article 3 of the Family Court Act are essentially similar to those prescribed by former Article 7. For a summary of the Article 7 proceedings concerning juvenile delinquents, the Court is respectfully referred to appellant Schall's jurisdictional statement, pages 13 through 21.

[10] A child may also, of course, be taken into custody pursuant to a warrant.

A "juvenile delinquent" is a person over seven and less than 16 years of age who, having committed an act that would constitute a crime if committed by an adult, is not criminally responsible for such conduct by reason of infancy. FCA, § 301.2(1).

A "crime" is defined in New York Penal Law, section 10.00(6) (Book 39, McKinney's Con. Laws of N.Y.), as a felony or a misdemeanor.

[11] Unless otherwise indicated, a reference to "parent" throughout this brief includes the modifying phrase "or other person legally responsible for the child's care, or if such legally responsible person is unavailable, the person with whom the child resides".

he may be questioned by the officer "for a reasonable period of time". FCA, § 305.2(4). A child may not be questioned, however, unless both he and his parents have been advised of the child's right to remain silent, that statements made by the child may be used in court, that the child has the right to have an attorney present, and that an attorney will be appointed if the child is indigent. FCA, § 305.2(7).

Before the filing of a petition, the agency responsible for operating a detention facility is authorized, "when practicable," to release a child to the custody of his parents "unless there are special circumstances requiring his detention." FCA, § 307.3(2). If the agency does not release the child, he must be brought before the Family Court within 72 hours or the next day court is in session, "whichever is sooner" (FCA, § 307.3[4]), at which time the Court must hold a hearing "for the purpose of making a preliminary determination of whether the court appears to have jurisdiction over the child". FCA, § 307.4(1). The child and his parents are advised of the child's "right to remain silent and of his right to be represented by counsel chosen by him or by a law guardian assigned by the court". FCA, § 320.3; *see* FCA, § 307.4(3). If independent legal representation is not available, the Court must appoint a law guardian. FCA, § 307.4(2). Unless certain specified findings are made, the child is released to the custody of his parents. FCA, § 307.4(4). A child who is detained following the hearing must be released unless a petition is filed within four days of the conclusion of the hearing. FCA, § 307.4(7).

Prior to the filing of a petition, the probation service is authorized to confer with the child, the person seeking to have the petition filed and other interested persons "concerning the advisability of requesting that a petition be filed". FCA, § 308.1(1). With certain statutory exceptions (FCA, § 308.1[3, 4]), probation may then attempt to

"adjust suitable cases before a petition is filed".[12] FCA, § 308.1(2). The fact that a child has been detained prior to the filing of the petition does not preclude probation from adjusting the case. If an adjustment occurs, the child is released. FCA, § 308.1(5).

A juvenile delinquency proceeding originates with the filing of a verified petition (FCA, § 311.1[1, 4]) which contains, *inter alia*, "a plain and concise factual statement ... which ... asserts facts supporting every element of the crime charged and the respondent's commission thereof" and "a statement that the respondent requires supervision, treatment or confinement". FCA, §311.1(3)(h, j)).[13] A petition is sufficient only if (FCA, § 311.2[2, 3]):

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[12] According to a Vera Institute of Justice Study of a New York City sample of 1890 potential delinquency cases, admitted into evidence at trial, 532 (28 percent) were adjusted informally at probation intake.

Witnesses testified that a case may be "terminated without adjustment" if a complaining witness, *e.g.*, fails to appear or advises probation that he does not want to proceed. Approximately 22 percent of the cases in the Vera Study were so terminated.

[13] FCA, § 315.2(1), provides, in part:

> "A petition or any part or count thereof may at any time be dismissed in furtherance of justice when, even though there may be no basis for dismissal as a matter of law, such dismissal is required as a matter of judicial discretion by the existence of some compelling further consideration or circumstances clearly demonstrating that a finding of delinquency or continued proceedings would constitute or result in injustice...."

Also, at any time prior to the conclusion of the dispositional phase of the proceeding, the Family Court, with certain statutory exceptions, may order that the proceeding be "'adjourned in contemplation of dismissal'", an adjournment, upon conditions, for a period not to exceed six months "with a view to ultimate dismissal of the petition in furtherance of justice". FCA, § 315.3(1).

"2. the allegations of the factual part of the petition, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the respondent committed the crime or crimes charged; and

3. non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof."

After the filing of the petition, the child is brought before the Court for an initial appearance (see, FCA, § 320.1). If the child is detained, the initial appearance must be held no later than 72 hours after the petition is filed or the next day the Court is in session, whichever is sooner. FCA, § 320.2(1). At the time of the hearing, the child and his parents must be advised of the child's right to remain silent and of his right to be represented either by counsel chosen by him or by a law guardian assigned by the Court. FCA, § 320.3. The Court must appoint a law guardian if independent legal representation is not available to the child. FCA, § 320.2(2).

At the initial appearance, "the court in its discretion may release the respondent or direct his detention". FCA, § 320.5(1). The child must, however, be released if the Court cannot state "facts and reasons" for finding that "unless the respondent is detained: (a) there is a substantial probability that he will not appear in court on the return date [of the fact-finding hearing, *i.e.*, trial]; or (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime."[14] FCA, § 320.5(3). It is this latter provision,

[14] According to the testimony at trial of a judge of the New York Family Court, probation service, based on its contact with the child and others during the pre-petition adjustment stage of the proceeding, makes a recommendation as to whether the child ought to be released or detained (JA: 254).

which allows detention upon a finding of serious risk of future crime, which is challenged by petitioners and which was held invalid by the Courts below.[15] Section 320.5(3)(a), which provides for detention upon a finding of probability of flight, is not affected by the instant proceeding. The "detention hearing" will be discussed in more detail in the Argument portion of this brief.

If it is determined at the initial appearance that a child is to be detained for more than three days pending a fact-finding hearing, the Court is required to schedule a probable cause hearing, which must be held within three days of the initial appearance.[16] FCA, § 325.1(1, 2). At the hearing, the presentment agency[17] is enjoined by statute to "call and examine witnesses and offer evidence in support of the charge". FCA, § 325.2(1)(a). The child may testify on his own behalf as a matter of right. If he chooses

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[15] Petitioners challenge only the detention authorized by section 320.5(3), *i.e.*, post-petition, pre-fact-finding detention. The pre-petition detention and any detention following the fact-finding hearing but prior to the dispositional hearing are not involved in this proceeding.

[16] "For good cause shown, the court may adjourn the hearing for no more than an additional three court days." FCA, § 325.1(3). The initial three day detention period is inclusive of Saturdays, Sundays and public holidays. *Matter of Kenneth D.*, 102 Misc 2d 363, 423 N.Y.S. 2d 423 (Fam. Ct., Kings Co. 1979).

If a timely probable cause hearing cannot be held "the Court may dismiss the petition without prejudice or for good cause shown adjourn the hearing and release the respondent". FCA, §325.3(4).

[17] The "presentment agency" is the agency or authority which, under the Family Court Act (*see* §§ 254, 254-a), "is responsible for presenting a juvenile delinquency petition". FCA, § 301.2(12).

to do so, his testimony may be used in future proceedings only for impeachment purposes. FCA, § 325.2(1)(b). Upon the request of the child, the Court shall, except for good cause shown, permit him to call and examine other witnesses or produce other evidence on his own behalf. FCA, § 325.2(1)(c). Each witness called must testify under oath unless he would be authorized to give unsworn testimony at a fact-finding hearing.[18] All witnesses, including the child if he testifies, may be cross-examined. FCA, § 325.2(2).

With certain limited statutory exceptions, only non-hearsay evidence is admissible at the hearing. FCA, § 325.2(3). At the conclusion of the hearing, the Court is required to determine whether it is reasonable to believe that a crime was committed and that the child committed it.[19] FCA,

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[18] See FCA, § 343.1(2):

> "Every witness more than twelve years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath. If the court is not so satisfied, such child or such witness over twelve years old who cannot, as a result of mental disease or defect, understand the nature of an oath may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof."

[19] Section 70.10(2) of the New York Criminal Procedure Law (Book 11A, McKinney's Con. Laws of N.Y.) provides:

> " 'Reasonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it."

§ 325.3(1). Upon so finding, the Court must also determine whether continued detention is necessary. FCA, § 325.3(3). If the Court cannot find the requisite probable cause, "the case shall be adjourned and the respondent released from detention". FCA, § 325.3(4).

The next stage in the judicial process is the fact-finding hearing, which, if the child is in detention, must commence no more than three days after the conclusion of the initial appearance.[20] FCA, § 340.1(1). The purpose of this hearing is to determine whether the child "committed an act or acts which if committed by an adult would be a crime". FCA, § 342.2(2). Only evidence that is "competent, material and relevant" may be admitted (FCA, § 342.2[1]), and any determination that the child did the act or acts complained of must be based upon proof beyond a reasonable doubt. FCA, § 342.2(2).

Following a finding that the child committed the alleged acts, the Court must hold a dispositional hearing, the purpose of which is to determine whether the child requires supervision, treatment or confinement. FCA, § 352.1(1). If the child is detained, the hearing must commence within

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[20] If the act involved is a class A, B or C felony, and the child is in detention, the fact-finding hearing may commence no later than 14 days after the conclusion of the initial appearance. FCA, § 340.1(1).

If the child is in detention, the hearing may be adjourned on the Court's own motion or on the motion of the presentment agency "for good cause shown" for not more than three days. FCA, § 340.1(3)(a). On the child's motion, the hearing may be adjourned "for good cause shown" for not more than 30 days. FCA, § 340.1(3)(b). The Court must state on the record the reason for any adjournment. FCA, § 340.1(4).

10 days of the finding.[21] FCA, § 350.1(1). Only evidence that is material and relevant may be admitted, and an adjudication must be based on a preponderance of the evidence. FCA, § 350.3(1, 2). If, at the conclusion of the hearing, the Court determines that the child does not require supervision, treatment or confinement, the petition is dismissed. FCA, § 352.1(2). Upon a finding that supervision, treatment or confinement is necessary, an adjudication of juvenile delinquency is made, and the Court enters an appropriate order of disposition. FCA, § 352.1(1). In determining an appropriate disposition, the Court is required to order "the least restrictive available [statutory] alternative ... which is consistent with the needs and best interests of the respondent and the need for the protection of the community". FCA, § 352.2(2). Dispositions include conditional discharge, probation and placement. FCA, § 352.2(1); *see* FCA, §§ 353.1 *et seq.* The final order must state the Court's reasons for the particular disposition. FCA, § 352.2(3).[22]

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[21] The dispositional hearing may be adjourned on the Court's motion or on the motion of the presentment agency "for good cause shown" for not more than 10 days (FCA, § 350.1[3][a]); on the child's motion, the hearing may be adjourned "for good cause shown" for not more than 30 days. FCA § 350.1(3)(b). The Court must state on the record the reasons for any adjournments. FCA, §350.1(4).

[22] Throughout the sections referred to, the Family Court Act makes special provisions for "designated felony acts", *i.e.*, acts which, if done by an adult, would constitute certain designated serious crimes, *e.g.*, murder, kidnapping, arson. FCA, § 301.2(8).

Summary of Argument

I

The appeal is not moot. Although the pretrial detentions of the named petitioners have ended, the reasoning of this Court in *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975), is equally applicable here and supports the proposition that "[t]his case belongs ... to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of unnamed members of the class". *Id.*

Nor has the amendment of the Family Court Act, enacted subsequent to the determinations of the Courts below and noted in appellant Schall's jurisdictional statement, mooted the appeal. The new Article 3 governing juvenile delinquency proceedings provides in section 320.5(3)(b) for pretrial detention under a standard identical to that in former section 739(a)(ii), the section originally challenged by petitioners. While some changes have been made in the procedures which precede and follow the detention hearing, the petitioner class is subject to the same detention procedures under the Family Court Act as amended as it was under the sections formerly applicable. *See Brockington* v. *Rhodes*, 396 U.S. 41, 41-43 (1969).

II

With respect to juveniles, the objectives of ensuring the safety of the community and protecting it from crime justify the utilization of pretrial detention. So long as a statute contains safeguards to protect the obvious liberty interest of the potential detainee, the Constitution is sufficiently flexible to incorporate a community's legitimate

concern for its safety and well-being. Section 320.5(3)(b) of the New York Family Court Act does not violate the Due Process Clause of the Fourteenth Amendment.

A.1. Section 320.5(3)(b) cannot be held violative of due process on the ground that it is necessarily premised on a prediction of future criminal behavior. This Court has consistently rejected the argument that utilization of such a prediction is *per se* unconstitutional. Last term, this Court reiterated that "the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty". *Barefoot* v. *Estelle*, — U.S. —, 51 U.S.L.W. 5189, 5194 (June 28, 1983), *citing Jurek* v. *Texas*, 428 U.S. 262 (1976).

"[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." *Jurek* v. *Texas*, *id.*, 428 U.S. at 275; *see, e.g., Carbo* v. *United States*, 82 S. Ct. 662, 666, 7 L. Ed. 2d 769 (1962) (Douglas, Circuit Justice) (prediction of dangerousness as basis for denying bail pending appeal); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 8 (1979) (decision to parole an inmate involves a predictive judgment as to what is best for individual and community).

In light of these considerations, two courts have explicitly rejected arguments that the predictive nature of the preventive detention decision is violative of due process. *United States* v. *Edwards*, 430 A. 2d 1321 (D.C. App. 1981) (*en banc*), *cert. denied*, 455 U.S. 1022 (1982); *People ex rel. Wayburn* (*Charles L.*) v. *Schupf*, 39 NY 2d 682, 385 N.Y.S. 2d 518, 350 N.E. 2d 906 (1976) (sustaining constitutionality of predecessor of section 320.5[3][b] as against a due process challenge substantially identical to that of petitioners herein).

2. While the predictive decisional process necessitated by section 320.5(3)(b) affects a substantial liberty interest of the juvenile involved which is entitled to the protection of the Due Process Clause, the Family Court Act prescribes procedures which are "fundamentally fair" and which preclude arbitrary action by Family Court judges applying section 320.5(3)(b).

None of the substantive deficiencies in the section noted by the Courts below are of constitutional dimension. The fact that the section does not place limits on the crimes which initially subject a juvenile to detention does not violate due process. There being nothing in the record to support the proposition that some crimes are more or less predictive of future criminal behavior than others, the question whether to so limit the categories of crimes is a legislative, rather than a constitutional, judgment.

Similarly, nothing in the record or the decisions below suggests how limiting potential crimes to felonies or violent crimes would in any manner minimize the risk of an incorrect prediction. We contend that the decision regarding the nature of the future crimes from which the community is to be protected is a legislative judgment which does not implicate fundamental fairness.

In requiring a statement of facts and reasons supporting a decision to detain, section 320.5(3)(b) fully provides the process which is due. *Cf. Kent* v. *United States*, 383 U.S. 541, 561 (1966). The record demonstrates that, in light of that requirement, Family Court judges assess a number of factors, including the nature of the crime charged and the probability the juvenile committed it; the juvenile's relationship with his parents; and, the juvenile's prior court contacts. So far from being an unprincipled guess, the determination of the judge to detain is premised on such information about the child as can reasonably be obtained prior to the detention hearing.

Although the Family Court Act does not require a finding of probable cause to be made contemporaneously with the detention decision, the procedures established by the statute are consistent with *Gerstein* v. *Pugh, supra,* 420 U.S. 103, and consonant with the dictates of due process. The non-hearsay allegations of the verified petition must establish reasonable cause. In any event, the requirement of the Act that a probable cause hearing be held within three days of detention (plus one extension of three court days "[f]or good cause shown") accords the juvenile the fundamental fairness which is due. *See Cooley* v. *Stone,* 414 F. 2d 1213 (D.C. Cir. 1969).

B. Both the legislative history of the predecessors to section 320.5(3)(b) and the statutory scheme of Article 3 support the conclusion that the section is reasonably related to the legitimate governmental function of protecting the community. Such a function is an "alternative purpose" sufficient to qualify section 320.5(3)(b) as a regulatory, rather than penal, measure wholly consistent with due process constraints. *See United States* v. *Edwards, supra,* 430 A. 2d at 1331-33, *cert. denied,* 455 U.S. 1022.

The record does not support the conclusion of the Court of Appeals that most detainees will either not be adjudicated guilty or will not be sentenced to confinement after adjudication of guilt. Even assuming, however, that a majority of detained juveniles will not be "placed" following a dispositional hearing, detention pursuant to section 320.5 (3)(b) is not thereby rendered punitive. In light of the broad range of dispositions available to Family Court judges and the additional information available at disposition, including information predicated on the detention period itself, dispositions less restrictive than placement do not call into question the initial assessment of dangerousness.

C. Section 320.5(3)(b) recognizes the need for preventive detention in order to provide for the protection of the community and does so with due regard for fundamental fairness and the rights of the juveniles involved.

ARGUMENT

Section 320.5(3)(b) of the New York Family Court Act, which authorizes the pretrial detention of a juvenile upon the Family Court's statement of facts and reasons for finding that, unless the juvenile is detained, there is a serious risk that he may, before the return date of the fact-finding hearing, commit an act which, if committed by an adult, would constitute a crime, comports with the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

I

Initially, we respectfully urge that, while two circumstances might lead this Court to consider the question of mootness, this appeal should be determined on the merits. First, although the pretrial detentions of the named petitioners have ended, the conclusion of this Court in *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n. 11 (1975), is equally applicable here and precludes a finding of mootness:

> "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional pro-

> cedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'"

See United States v. *Edwards,* 430 A. 2d 1321, 1324 n.2 (D.C. App. 1981) (*en banc*), *cert. denied,* 455 U.S. 1022 (1982). Also, the District Court's class certification militates against a finding that the proceeding is moot. *See Sosna* v. *Iowa,* 419 U.S. 393, 397-403 (1975). Indeed, although two of the named petitioners, Rosario and Morgan, were, in fact, in pretrial detention at the time of the certification on April 3, 1978, such a showing is not necessary to avoid mootness. *Gerstein* v. *Pugh, supra,* 420 U.S. at 111 n.11; *see United States Parole Commission* v. *Geraghty,* 445 U.S. 388, 399-40 (1980).[23]

Second, the amendment of the New York Family Court Act, substituting a new Article 3 to govern juvenile delinquency proceedings in place of former Article 7, has not mooted the appeal.[24] Pursuant to FCA, section 320.5 (3)(b), juveniles are presently subject to pretrial detention under a standard identical to that in former section 739(a)(ii), the section originally challenged by petitioners. That is, at the same stage of the process, subsequent to the filing of the petition and prior to the fact-finding hearing, juveniles continue to be subject to de-

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[23] As noted, the District Court intended its writ to reach "all detained juveniles held under the relevant act until this proceeding is concluded or the judgment entered is reversed". Commissioner Schall continues to release any juvenile remanded into her custody pursuant to FCA, section 320.5(3)(b).

[24] The new statute, which was signed by the Governor of the State of New York on December 20, 1982, subsequent to the determinations of the Courts below, was noted in Commissioner Schall's jurisdictional statement (pp. 21-22 n.). The statute became effective July 1, 1983.

tention upon the Family Court's stated facts and reasons for finding that, in the absence of detention, "there is a serious risk that [the juvenile] may before the return date commit an act which if committed by an adult would constitute a crime". Thus, while this Court must "review the judgment below in light of the . . . statute as it now stands, not as it once did" (*Hall* v. *Beals,* 396 U.S. 45, 48 [1969]), the statute has not been so "substantially amended" (*Princeton University* v. *Schmid,* 455 U.S. 100, 103 [1982]) as to moot the appeal. Under all of the circumstances, the case has clearly not "lost its character as a present, live controversy of the kind which must exist if [this Court is] to avoid advisory opinions on abstract propositions of law". *Hall* v. *Beals, supra,* 396 U.S. at 48. Unlike the situation in *Hall,* in which voters disenfranchised because of a residence requirement would not have suffered the same fate under the amended statute, the petitioner class herein is subject to the same detention procedures under the Family Court Act as amended as it was under the sections formerly applicable. *See Brockington* v. *Rhodes,* 396 U.S. 41, 41-43 (1969); *cf. Bell* v. *Wolfish,* 441 U.S. 520, 550 n.31 (1979).

II

In *Bell* v. *Wolfish,* 441 U.S. 520, 534 n.15 (1979), this Court left open the question whether any governmental objective other than ensuring a detainee's presence at trial may constitutionally justify pretrial detention. In partial response, we contend that with respect to juveniles, the objectives of ensuring the safety of the community and protecting it from crime justify the utilization of pretrial detention. "[O]ur common law and constitutional heritage has refused to abjure the institution of pretrial

detention. . . . '[T]he State's duty to control crime' . . . justifies in the first instance the institution of pretrial detention." *Campbell* v. *McGruder*, 580 F.2d 521, 527, 528 (D.C. Cir. 1978). So long as a statute is tailored with safeguards to protect the obvious liberty interest of the potential detainee, the Constitution is sufficiently flexible to incorporate a community's legitimate concern for its safety and well-being. "[T]he sharp increase in crime and a desire to compensate for a seeming progressive breakdown of our law enforcement structure" (*State* v. *Johnson*, 61 N.J. 351, 294 A. 2d 245, 250 [1972]) are realities which are not ignored by the Constitution. *L.O.W.* v. *District Court*, 623 P. 2d 1253 (Colo. 1981) (child may be detained if it is "contrary to the welfare . . . of the community to release the child from detention"); *Morris* v. *D'Amario*, 416 A. 2d 137 (R.I. 1980) (child can be removed from parents "when . . . the safety and protection of the public cannot be adequately safeguarded without his removal"); *People ex rel. Wayburn* (*Charles L.*) v. *Schupf*, 39 NY 2d 682, 385 N.Y.S. 2d 518, 350 N.E. 2d 906 (1976) (predecessor to FCA, section 320.5[3][b], held not to be violative of due process); *see United States ex rel. Covington* v. *Coparo*, 297 F. Supp. 203, 207 (S.D.N.Y. 1969) (writ of habeas corpus denied on ground State court reasonably found, *inter alia*, that the petitioner's release pending trial might constitute a danger to the community); *Parker* v. *Roth*, 202 Neb. 850, 278 N.W. 2d 106, *cert. denied*, 444 U.S. 920 (1979) (sustaining validity of State constitutional provision denying bail in cases of " 'sexual offenses involving penetration by force or against the will of the victim . . . where the proof is evident or the presumption great' ").

Embodying the concept of preventive detention, section 320.5(3)(b) of the New York Family Court Act permits a Family Court judge to detain a juvenile, for a very

limited period, upon stated facts and reasons for finding that, in the absence of detention, there is a serious risk that the juvenile may, before the return date of the fact-finding hearing, commit an act which, if committed by an adult, would constitute a crime. We submit that this section does not violate the Due Process Clause of the Fourteenth Amendment.[25] In Part A herein we argue first that the section is not unconstitutional by virtue of the fact that it is premised on a prediction of future criminal conduct, and second that it embodies fundamentally fair procedures and thereby provides the process which is due under the circumstances. In Part B, we demonstrate that pretrial detention pursuant to the section is a regulatory rather than penal measure and, therefore, that it does not authorize punishment prior to an adjudication of guilt.

(A)

(1)

Inherent in the concept of preventive detention is the necessity for a court to predict whether a particular person will, in the future, engage in criminal conduct. The District Court concluded (JA: 69-83) that since "no

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[25] As noted, petitioners' equal protection claim, rejected by the District Court, was neither raised in, nor decided by, the Court of Appeals. On this appeal, therefore, we do not address the issues, if any, raised by the fact that although New York does not provide for preventive detention of adults, FCA, section 320.5(3)(b), authorizes such detention of juveniles. *See People ex rel. Wayburn (Charles L.)* v. *Schupf, supra,* 385 N.Y.S. 2d at 520-521, 350 N.E. 2d at 908-910 (former section 739[a][ii] does not violate the Equal Protection Clause of the Fourteenth Amendment).

reliable method of predicting dangerousness . . . exists at this time . . . [,] the family court judge's opinion . . . is also unreliable" (JA: 80). However, in light of this Court's consistent rejection of the argument that utilization of a prediction of crime is *per se* unconstitutional, section 320.5(3)(b) cannot be held invalid on the ground that it is premised on predictions of future criminal behavior.

Citing *Jurek* v. *Texas*, 428 U.S. 262 (1976), this Court reiterated last term that "the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty". *Barefoot* v. *Estelle*, —— U.S. ——, 51 U.S.L.W. 5189, 5194 (June 28, 1983). In *Jurek*, this Court sustained the constitutionality of the Texas capital punishment statute. Texas law requires that, if a defendant has been convicted of a capital offense, the trial court is required to conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. After presentation of evidence and argument, the jury is required to consider two, and sometimes three, questions, the answers to which determine whether a death sentence is to be imposed. 428 U.S. at 267. In relevant part, the jury is required to determine "'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' if he were not sentenced to death". 428 U.S. at 272. In response to the petitioner's contention that "it [was] impossible to predict future behavior and that the question was so vague as to be meaningless" (428 U.S. at 274), the joint opinion stated (428 at 274-76):

> "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal con-

> duct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." (footnotes omitted)

In so stating, this Court was aware that "some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts". *Estelle* v. *Smith*, 451 U.S. 454, 472 (1981). The result, however, was not to find an infirmity in the statute, but, rather, to recognize "that the inquiry mandated by Texas law does not require resort to medical experts". 451 U.S. at 473. Thus, as a Texas jury may make up its own mind about future dangerousness, based on lay testimony (*see Barefoot* v. *Estelle, supra*, 51 U.S.L.W. at 5194), so a Family Court judge in New York may determine, on the basis of the information adduced at the initial appearance (see, *infra*, p. 37), whether there is a "serious risk" of future crime.[26]

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[26] This Court did not preclude the utilization of expert psychiatric testimony to aid the Texas jury in determining the ques-

(Footnote continued on following page)

A prediction that a person poses a danger to the community can serve as a basis for denying bail pending appeal. *See Carbo* v. *United States,* 82 S. Ct. 662, 666, 7 L. Ed. 2d 769 (1962) (Douglas, Circuit Justice); *Leigh* v. *United States,* 82 S. Ct. 994, 996, 8 L. Ed. 2d 269 (1962) (Warren, C.J.); 18 U.S.C., § 3148. *But see, Williamson* v. *United States,* 184 F. 2d 280 (2d Cir. 1950) (Jackson, Circuit Justice). Further, as this Court has explicitly recognized, predicting dangerous behavior is a necessary component of parole decisions. *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1, 8 (1979) (The decision to parole an inmate "involves a synthesis of record facts and personal observations filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community."); *Morrissey* v. *Brewer,* 408 U.S. 471, 480 (1972) (Parole revocation involves decisionmaking which "is not purely factual but also predictive and discretionary".); *see Connecticut Board of Pardons* v. *Dumschat,* 452 U.S. 458, 464 (1981) (Holding that an inmate has no constitutional or inherent right to commutation of his sentence, this Court noted that the decision to commute a long-term sentence generally depends not simply on objective fact finding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision.).

(Footnote continued from preceding page)

tion of future dangerousness. In *Barefoot* v. *Estelle, supra,* 51 U.S.L.W. at 5194-96, this Court rejected the contention that the use of such testimony at the punishment hearing was barred by the Constitution. The Court was "not persuaded that such testimony is almost always unreliable". 51 U.S.L.W. at 5195. Professional doubts about the usefulness of psychiatric predictions can be called to the attention of the fact-finder, trusting the adversary process "to sort out the reliable from the unreliable evidence and opinion about future dangerousness".

We note, too, that a determination that an accused may not appear for trial is recognized as a basis for denying bail. *People ex rel. Weisenfeld (Cifone)* v. *Warden*, 37 NY 2d 760, 374 N.Y.S. 2d 631, 337 N.E. 2d 140 (1975); *see Bell* v. *Wolfish, supra*, 441 U.S. at 534 ("Neither respondents nor the courts below question that the Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt. . . . Nor do they doubt that the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, or that confinement of such persons pending trial is a legitimate means of furthering that interest.").[27] The prediction of future crime, we submit, cannot be said to be any more or less speculative than a prediction of flight.

These considerations have lead two courts explicitly to reject arguments that the predictive nature of the preventive detention decision is violative of due process. Citing statistical studies concluding that criminal conduct cannot be predicted, the appellant in *United States* v. *Edwards, supra*, 430 A. 2d 1321, *cert. denied*, 455 U.S. 1022, contended that the District of Columbia statute which authorizes the preventive detention of adult alleged offenders for a maximum of 60 calendar days (see, D.C. Code Ann., § 23-1322[d][2][A] [1981])[27a] was impermis-

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[27] As noted, petitioners have not challenged FCA, section 320.5 (3)(a) (formerly, section 739[a][i]), which permits the Family Court to detain a juvenile upon a finding that "there is a substantial probability that [the juvenile] will not appear in court on the return date."

[27a] Upon the prosecutor's application, a person may be detained for an additional period not to exceed 30 days "on the basis of good cause shown" and "only for the additional time required to prepare for the expedited trial of such person". D.C. Code Ann., § 23-1322(d)(4) (1981) (1983 Cum. Supp.).

sibly overbroad. In sustaining the constitutionality of the statute, the Court responded (430 A. 2d at 1342):

> "Prediction of the likelihood of certain conduct necessarily involves a margin of error, but is an established component of our pretrial release system. Trial judges have been engaged in predicting the likelihood of flight for all defendants, capital and noncapital, and have predicted the likelihood of recidivism for capital offenses since the Judiciary Act of 1789. . . . Appellant's argument relies on the assumptions, which we do not share, that the judicial prediction of dangerousness, as distinguished from the prediction of likelihood of flight, is both a denial of a fundamental right and the imposition of punishment."

Similarly, in a habeas corpus proceeding, the Court of Appeals of the State of New York sustained the constitutionality of the predecessor of FCA, section 320.5 (3)(b), as against a due process challenge substantially identical to that of petitioners herein. *People ex rel. Wayburn (Charles L.)* v. *Schupf, supra,* 39 NY 2d 682, 385 N.Y.S. 2d 518, 350 N.E. 2d 906.[28] In so doing, the Court refused to accept the petitioner's argument that since the degree of probability of repetition of criminal behavior cannot be predicted with precision, there is necessarily involved an unconstitutional element of vagueness or speculation. The Court stated (385 N.Y.S. 2d at 522, 350 N.E. 2d at 910):

> "Such an element is necessarily present in the administration of any bail system, in the imposition of alternatively available sentences, in the adminis-

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[28] No appeal was taken to this Court from the order of the Court of Appeals. See 28 U.S.C., § 1257(2).

tration of a parole system, or in any other procedure in which discretionary authority for differing criminal dispositions is vested in a court or an administrative body."

It is difficult to imagine the functioning of the criminal justice system without the element of prediction in judicial and administrative decisionmaking. Decisions about bail, sentencing and parole have been found to be consistent with due process despite the facts that they affect individual liberty to a greater or lesser degree; that they are prospective in that they assess future risks; that they may in some measure be characterized as subjective; and that they have the potential to result in varying outcomes in similar cases.[29] We submit, therefore, that a decision to detain pursuant to FCA, section 320.5(3)(b), cannot be held to violate the Due Process Clause of the Fourteenth Amendment on the ground that it is necessarily premised on a prediction of future criminal conduct.

(2)

Having established that the utilization of predictive judgments of criminal behavior is not *per se* unconstitutional, we do not dispute that the predictive decisional process necessitated by FCA, section 320.5(3)(b), affects a liberty interest of the juvenile involved which is entitled to the protection of the Due Process Clause of the

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[29] "Acceptance of [the] position that expert testimony about future dangerousness is far too unreliable to be admissable [sic.] [at a sentencing hearing to determine whether the death penalty should be imposed] would immediately call in question those other contexts in which predictions of future behavior are constantly made." *Barefoot* v. *Estelle, supra,* 51 U.S.L.W. at 5194.

Fourteenth Amendment. *See United States* v. *Edwards, supra,* 430 A. 2d at 1333-34, *cert. denied,* 455 U.S. 1022. It is our contention that the Family Court Act prescribes procedures which are "fundamentally fair" (*Lassiter* v. *Department of Social Services,* 452 U.S. 18, 24-25 [1981]; *Gagnon* v. *Scarpelli,* 411 U.S. 778, 790 [1973]; *McKeiver* v. *Pennsylvania,* 403 U.S. 528, 543 [1971]) and which preclude arbitrary action by Family Court judges applying section 320.5(3)(b).

"[D]ue process 'is flexible and calls for such protections as the particular situation demands.'" *Greenholtz* v. *Nebraska Penal Inmates, supra,* 442 U.S. at 12. In determining "what process is due" (*Morrissey* v. *Brewer, supra,* 408 U.S. at 481), the Court is required to balance three factors: the private interest at stake, the countervailing governmental interest supporting use of the challenged procedures, and the risk that the procedures chosen will lead to an erroneous decision. *Santosky* v. *Kramer,* 455 U.S. 745, 754 (1982); *Lassiter* v. *Department of Social Services, supra,* 452 U.S. at 27; *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976). In the instant case, the private interest involved, unfettered liberty prior to an adjudication of guilt, and the countervailing governmental interests, preserving the community and protecting it from danger pursuant to "a simplified yet fair" hearing (*United States* v. *Edwards, supra,* 430 A. 2d at 1336), are readily ascertainable and equally significant. Focusing, then, on the third factor, we submit that it has not been demonstrated that the procedures prescribed by the New York Legislature are not fair or that different or additional procedures would reduce the risk of an erroneous depri-

vation of liberty. *See Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982).[30]

With respect to minimizing the risk of error, none of the substantive deficiencies in former section 739(a)(ii) (and, necessarily, in current section 320.5[3][b]) noted by the majority and concurring opinions in the Court of Appeals are of constitutional dimension. The concurring opinion suggests that the section ought to "[place] . . . limits on the crimes for which the person subject to detention has been arrested" (JA: 121). There is nothing in the record or the opinion to support the proposition that some crimes are more or less predictive of

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[30] Petitioners appropriately do not contend that the statute lacks the traditional due process requirements of notice and a hearing. The petition which commences a juvenile delinquency proceeding must contain, *inter alia*, "a plain and concise factual statement in each count which ... asserts facts supporting every element of the crime charged and the respondent's commission thereof, with sufficient precision to clearly apprise the respondent of the conduct which is the subject of the accusation". FCA, § 311.1(3)(h). Also, the petition, together with any supporting depositions, must provide reasonable cause to believe that the juvenile committed the crime charged; non-hearsay allegations of the petition and any supporting depositions must establish, if true, every element of the crime charged. FCA, § 311.2. The juvenile is further apprised by the statute that his previous delinquency findings entered by the Family Court may be introduced for the purpose of determining whether he ought to be released or detained. FCA § 320.5(4). The detention decision is made at the initial appearance, and the hearing that is held is clearly adequate to meet the demands of procedural due process. We note also that the juvenile and his parents must be informed of the juvenile's right to remain silent and of his right to be represented by independent counsel or by a law guardian assigned by the Court. FCA, § 320.2(3).

future criminal behavior than others.[31] Limiting the categories of juveniles subject to preventive detention to those who commit "violent" or "dangerous" crimes may reduce the number of those detained,[32] but that, we submit, is a legislative, rather than a constitutional, judgment. The factors upon which a Family Court judge bases a determination to detain (see, *infra*, p. 37) are equally applicable to "minor" and "major" crimes alike.

The majority noted that the section does not limit the potential crimes "to felonies or violent crimes but include[s] every act which constitutes a crime under the New York Penal Law" (JA: 101; see also, concurring opinion at JA: 121). Again, the Court does not suggest any explanation, and none is apparent, as to how so limiting the section would in any manner minimize the risk of an incorrect prediction. Indeed, one of petitioners' expert witnesses, Professor Leslie Wilkins, a criminologist and statistician, testified that predictions of "serious

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[31] Speculation might lead one to surmise that a juvenile would be more likely to repeat "minor" criminal acts than he would "major" crimes.

[32] Pursuant to the District of Columbia preventive detention statute sustained in *United States* v. *Edwards*, *supra*, 430 A. 2d 1321, *cert. denied*, 455 U.S. 1022, the only persons subject to detention are those charged with a "dangerous crime" or a "crime of violence", as defined by the statute, and those charged with any offense who, "for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror". D.C. Code Ann., §§ 23-1322(a), 23-1331(3, 4) (1981). It has been noted that, nonetheless, the statute encompasses two-thirds of those persons charged with crime in the District, including those with no prior criminal convictions. P.D. Borman, *The Selling of Preventive Detention 1970*, 65 Nw. U. L. Rev. 879, 926-27 (1971).

crimes" or "crimes of violence" are "a lot worse" than predictions of crime generally (JA: 199). In light of this, we submit that, as with the decision regarding what crimes will initially subject a juvenile to detention, the decision regarding the nature of the future crimes from which the community is to be protected is a legislative judgment which does not implicate fundamental fairness. *Cf. United States* v. *Edwards, supra,* 430 A. 2d at 1341, *cert. denied,* 455 U.S. 1022. Having determined that a particular act is criminal in nature, the legislature may conclude that the community is entitled to be protected from it no matter how "minor" one may choose to classify it.[33]

The majority also noted that section 320.5(3)(b) lacked "substantive criteria . . ., such as prior court contacts or lack of family supervision, to limit which accused juveniles may be detained" (JA: 102; see also, concurring opinion at JA: 121: "the judge is not required to assess the individual's background"). In so stating, however, the Court wholly ignored the statutory requirement that the judge must state the "facts and reasons" supporting a decision to detain. The purpose of this requirement is to improve judicial decisionmaking "while providing a basis for review of the individual case, guid-

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[33] The District of Columbia statute provides for pretrial detention upon a finding, *inter alia,* that "there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community". D.C. Code Ann., § 23-1322(b)(2)(B) (1981). Although commentators at the time of the statute's enactment argued that it lacked guidelines delineating the type of behavior from which the community is to be protected (see P.D. Borman, *The Selling of Preventive Detention 1970, supra,* 65 Nw U. L. Rev. at 892), the constitutionality of the statute was nonetheless sustained.

ance for others who will later deal with the child, and legislative review of detention practices". S. K. Barsky and R. N. Gottfried, Practice Commentary to Section 739, Book 29A, Part 1, McKinney's Con. Laws of N.Y. (Supp. Pamphlet 1976-1978), p. 369. The obligation of the Family Court judge to justify the decision to detain provides the process which is due under the circumstances. *Cf. Morrissey* v. *Brewer, supra,* 408 U.S. at 489 (parole revocation necessitates, *inter alia,* "a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole"); *Kent* v. *United States,* 383 U.S. 541, 556, 561 (1966) (waiver of jurisdiction by a juvenile court, "a 'critically important' action determining vitally important statutory rights of the juvenile," held to require, *inter alia,* "a statement of reasons or considerations therefor").[34]

As to the factors utilized in determining whether release or detention is appropriate in a particular case, a judge of the New York Family Court testified at trial

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[34] We note that the concurring opinion in the Court of Appeals erred in concluding that the District of Columbia preventive detention statute provides a "standard of proof" by which the judge is to determine dangerousness (JA: 122). In fact, that statute is analogous to section 320.5(3)(b) in this regard; it requires that the Court issue written findings of fact and the reasons for finding that "there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community". D.C. Code Ann., § 23-1322(b)(2)(B), (b)(3) (1981); *see Morris* v. *D'Amario, supra,* 416 A. 2d at 141-42 ("If the court determines that detention . . . will best serve the interests of the child and the community, it must articulate in writing the facts and reasons on which it based its decision to detain the juvenile."); *Doe* v. *State,* 487 P. 2d 47, 53 (Alaska 1971) (Due process requires at the very least . . . that the detention order state with particularity the facts supporting it.").

that he and his colleagues consider the following (JA: 263-67): the seriousness of the acts alleged in the petition; an evaluation of the probability that the allegations will be sustained; the age of the victim; the time of day of the acts, indicating, perhaps, a lack of parental control; the juvenile's past record and the proximity in time of the present alleged acts to prior acts; and any information developed at the hearing.[35] Moreover, a parent accompanying the child may be questioned regarding the behavior of the child at home, the relationship between the parent and child, etc. (JA: 257). If a clergyman or social worker accompanies the child, he may be given an opportunity to speak on the child's behalf (JA: 257). Finally, probation, which interviewed the child and others prior to the filing of the petition, makes a recommendation as to whether the child ought to be released or detained (JA: 254).[36] As so interpreted (*cf. Jurek* v.

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[35] These factors correspond closely to the matters to be "take[n] into account" by the judicial officer making a determination under the District of Columbia preventive detention statute. D.C. Code Ann., §§ 23-1321(b), 23-1322(b)(2)(B) (1981).

[36] This process ensures that the detention decision is made on an individual basis, supported, as required by FCA, section 320.5(3), by judicially reviewable stated facts and reasons. *Cf. Huihui* v. *Shimoda*, 644 P. 2d 968 (Ha. 1982) (denial of bail to particular class of offenders creates a conclusive presumption of dangerousness and thus violates State constitutional right to bail); *In re William M.*, 3 Cal. 3d 16, 89 Cal. Rptr. 33, 473 P. 2d 737 (1970) (judicial decision to detain on grounds of dangerousness premised solely on act committed, without regard to individual factors involved, denies due process). *Compare Parker* v. *Roth*, 202 Neb. 850, 278 N.W. 2d 106, *cert. denied*, 444 U.S. 920 (1979) (State constitutional provision denying bail

(Footnote continued on following page)

Texas, supra, 428 U.S. at 272-73 [relying on judicial construction of terms "criminal acts of violence" and "continuing threat to society" in statute defining when jury may impose death penalty]), section 320.5(3)(b) clearly does not embody the inadequacy noted by the Court of Appeals.[37] So far from being an unprincipled guess, the determination of the Family Court judge to detain is premised on such information about the child as can reasonably be obtained prior to the detention hearing.

Finally, the District Court held (JA: 86-88), and the concurring opinion in the Court of Appeals suggests (JA: 121), that section 320.5(3) is constitutionally infirm because it does not provide for a contemporaneous finding of probable cause that a crime has been committed and that the juvenile committed it. We do not contend that a juvenile may be detained in the absence of a finding

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in cases of "'sexual offenses involving penetration by force or against the will of the victim ... where the proof is evident or the presumption great'" held valid and proper in all respects) *with Hunt* v. *Roth,* 648 F. 2d 1148 (8th Cir. 1981), *vacated as moot sub. nom. Murphy* v. *Hunt,* 455 U.S. 478 (1982) (same statute held violative of Eighth Amendment proscription against excessive bail).

[37] The determination of the District Court in this regard must also be rejected. The Court concluded that predictive decisions regarding bail, sentencing, parole and imposition of the death penalty are distinguishable from the detention decisions pursuant to FCA, section 320.5(3)(b), since, according to the Court, the former decisions are made on the basis of background information about the person involved, whereas "[t]he family court judge in making a [detention] decision knows nothing about the juvenile if he is a first time offender" (JA: 82). Even if the child has had prior court contact, the judge "must operate on intuition and personal predilections, the antithesis of reasoned action" (JA: 83).

of probable cause. *Compare Morris* v. *D'Amario, supra,* 416 A. 2d at 142 ("[W]e reject [the] argument that juveniles facing prehearing detention must be afforded a probable-cause hearing."), *with Moss* v. *Weaver,* 525 F. 2d 1258, 1260 (5th Cir. 1976) ("Pretrial detention is an onerous experience, especially for juveniles, and the Constitution is affronted when this burden is imposed without adequate assurance that the accused has in fact committed the alleged crime."). We do submit, however, that the procedure established by the Family Court Act is consistent with *Gerstein* v. *Pugh, supra,* 420 U.S. 103, and consonant with the dictates of due process.

First, as we have noted, the Act requires that the petition, which is required to be verified (FCA, § 311.1[4]), together with any supporting depositions, must provide reasonable cause to believe the child committed the crime charged. Also, the "non-hearsay allegations of the factual part of the petition or of any supporting depositions [must] establish, if true, every element of each crime charged and the respondent's commission thereof". FCA, § 311.2 (2, 3). Given this Court's determination that a probable cause hearing may be an informal, nonadversary proceeding on hearsay and written testimony, without confrontation and cross-examination (*Gerstein* v. *Pugh, id.,* 420 U.S. at 119-23), it is clear that, at the initial appearance, a Family Court judge could find that probable cause exists. That he is not required to do so does not, under the circumstances, amount to a deprivation of due process.

In any event, the requirement of the Family Court Act that the probable cause hearing be held "within three days following the initial appearance or within four days following the filing of a petition, whichever occurs sooner"

(FCA, § 325.1[2])[38] conforms to the holding of *Gerstein* that a probable cause hearing is a "prerequisite to extended restraint of liberty following arrest". *Gerstein* v. *Pugh*, *id.*, 420 U.S. at 114; *see Cooley* v. *Stone*, 414 F. 2d 1213 (D.C. Cir. 1969) (detention hearing held day after arrest and initial hearing held seven days later; court held that juvenile cannot be lawfully detained without prompt judicial determination of probable cause, which must be made at least by the time of the initial appearance). In this regard, we note that the probable cause hearing mandated by the Family Court Act is a considerably more formal proceeding than that authorized in *Gerstein*. The child has been informed of his right to remain silent and to be represented by counsel of his own choosing or by a law guardian appointed by the court. FCA, § 320.3. The presentment agency must first call and examine witnesses and offer evidence in support of the charge. The child may, as a matter of right, testify on his own behalf, and, except for good cause shown, he may call and examine witnesses and offer other evidence on his own behalf. If he does choose to testify, his testimony may be used only for impeachment purposes in subsequent proceedings. Every witness, unless authorized to give unsworn testimony at the fact-finding hearing, must testify under oath, and every witness, including the child, is subject to cross-examination. With limited statutory exceptions, only non-hearsay evidence is admissible. FCA, § 325.2.

In light of the above, and given this Court's recognition of "the desirability of flexibility and experimentation by the States" (*Gerstein* v. *Pugh*, *supra*, 420 U.S. at 123),

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[38] The Court may adjourn the hearing for no more than an additional three court days "[f]or good cause shown". FCA, § 325.1(3).

the statutory scheme of the Family Court Act, we submit, fully complies with the requirements of due process and accords the detained juvenile the fundamental fairn ss which is due.

(B)

The Courts below held, each on a different theory, that detention pursuant to FCA, section 320.5(3)(b), constitutes punishment before adjudication of guilt in violation of the Due Process Clause of the Fourteenth Amendment. We submit that the preventive detention authorized by the section is regulatory, rather than penal, in nature and, therefore, not violative of due process. *See Wong Wing* v. *United States,* 163 U.S. 228, 235 (1896).

"This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Bell* v. *Wolfish, supra,* 441 U.S. at 537. Applying the traditional tests to distinguish between penal and regulatory measures set forth in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 168-69 (1963) and restated in *Bell, supra,* 441 U.S. at 537-38, the Court in *United States* v. *Edwards, supra,* 430 A. 2d 1321, *cert. denied,* 455 U.S. 1022, concluded that the intention "to protect the safety of the community until it can be determined whether society may properly punish the defendant" (430 A. 2d at 1332) was an "alternative purpose" sufficient to qualify the preventive detention statute there in issue as a regulatory, rather than a penal, measure. 430 A. 2d at 1331-33.

The analysis of the Court in *Edwards* is equally applicable to FCA, section 320.5(3)(b). Both its history and the statutory scheme of Article 3 of the Family Court Act support the conclusion that it is a regulatory mea-

sure wholly consistent with due process constraints. The predecessor to section 320.5(3) was specifically "designed to avoid any routine detention of a child". Committee Comments to FCA, § 739, reprinted in Book 29A, McKinney's Con. Laws of N.Y., p. 619. "Excessive", "unnecessary" and "routine" detentions were to be curbed under the formulations of the Family Court Act. See Report of the Joint Legislative Committee on Court Reorganization, reprinted in 1962 McKinney's Session Laws of N.Y., p. 3438. The objective, then, of former section 739 was to ensure the detention only of those juveniles who posed a substantial risk of flight or a serious risk of danger. Such a measure is clearly regulatory, not penal, in intent: "[p]retrial detention to prevent repetition of dangerous acts . . . by incapacitating the detainee seeks to curtail reasonably predictable conduct, not to punish for prior acts." *United States* v. *Edwards, supra,* 430 A. 2d at 1332, *cert. denied,* 455 U.S. 1022.

The statutory scheme buttresses this conclusion. In light of the procedures mandated by the Family Court Act, which, as noted, include a verified, non-hearsay petition providing reasonable cause, and release if a probable cause hearing cannot be timely held or if probable cause is not found, preventive detention pursuant to section 320.5(3)(b) "is closely circumscribed so as not to go beyond the need to protect the safety of the community pending the detainee's trial". *United States* v. *Edwards, id.,* 430 A. 2d at 1333. Since the detention is "reasonably related to a legitimate governmental objective, it does not [therefore] amount to 'punishment' ". *Bell* v. *Wolfish, supra,* 441 U.S. at 539.

Choosing to ignore the analysis in *Kennedy* v. *Mendoza-Martinez, Bell* v. *Wolfish,* and *United States* v. *Edwards,* the Court of Appeals herein concluded that since

"in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt ... [,] the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard" (JA: 114). On that basis, former section 739(a)(ii) was held to be unconstitutional. The Court, we respectfully submit, erred in its analysis.

The brief of the Attorney General demonstrates that the record does not support the Court's determination that "the vast majority of juveniles detained under 739 (a)(ii) either have their petitions dismissed before an adjudication of delinquency or are released after adjudication" (JA: 103).[39] In any event, even assuming that a majority of preventively detained juveniles are not "placed" subsequent to a dispositional hearing, to conclude that detention under section 320.5(3)(b) is thereby unconstitutional is to misperceive the entire structure of Article 3 of the Family Court Act. As properly noted by the New York Court of Appeals in sustaining the immediate predecessor to section 320.5(3)(b) (*People ex rel. Wayburn [Charles L.] v. Schupf, supra,* 385 N.Y.S. 2d at 552, 350 N.E. 2d at 910):

> "[I]t must be apparent that there is a vastly different body of relevant data on which to make an informed determination as to the desirability of placement after the dispositional hearing. It should surprise no one that caution and concern for both the juvenile and society may indicate the more con-

[39] Judge Newman, concurring below, stated that he was "less certain than the majority that the record supports a conclusion of a significant number of instances where detention was imposed either mistakenly or for purposes of punishment" (JA: 117).

servative decision to detain at the very outset, whereas the later development of very much more relevant information may prove that while a finding of delinquency was warranted, placement would not be indicated."

Given the broad range of choices available to a Family Court judge at the dispositional phase (see, FCA, § 352.2[1]), we reject the conclusion that the brief pretrial detention period is punitive because a juvenile is subsequently discharged subject to conditions for a period of one year (FCA, § 353.1) or put on probation for two years (FCA, § 353.2). Such dispositions do not in any respect call into question an initial determination of dangerousness; they, in fact, reinforce it by requiring close supervision of the juvenile while also reflecting both possible changed circumstances (*e.g.*, demonstrated willingness to accept parental authority; exemplary behavior during detention) and the purposes and goals of the Family Court Act. That former detainees may not be placed following a dispositional hearing does not, therefore, mean that due process has been denied; it is evidence, rather, that at the dispositional phase the system is, in fact, working. Finally, the conclusion of the Court of Appeals that pretrial detention is punitive because of failures to prosecute ignores those situations where, for example, a complaining witness refuses to testify or a decision is made to prosecute on a different petition filed against the juvenile.[40]

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[40] The opinion of the Court of Appeals is also conceptually unsound insofar as it searches for "a compelling governmental interest" to justify "the imposition of sanctions ... before, rather than after, adjudication" (JA: 112). As the cited decisions of this

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The Court of Appeals erred in finding detention under FCA, section 320.5(3)(b), to be punishment preceding adjudication and, therefore, unconstitutional. The section, rather, serves the alternative purpose of protecting the community against reasonably predictable dangerous behavior, a regulatory function consistent with the Due Process Clause of the Fourteenth Amendment. *United States* v. *Edwards, supra,* 430 A. 2d at 1331-33, *cert. denied,* 455 U.S. 1022.[41]

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Court make clear, punishment which precedes adjudication is *per se* unconstitutional. We do not urge that this Court find a compelling reason to impose pre-adjudication punishment. Our argument, rather, is that, as envisioned by the New York Legislature and applied by the courts, section 320.5(3)(b) is a regulatory, not a penal, measure. *See generally Bell* v. *Wolfish, supra,* 441 U.S. at 531-40.

[41] The question as to whether juveniles have a constitutional right to bail was neither raised in nor decided by the Courts below. We therefore address the issue only briefly.

This Court has recognized that the prohibition against excessive bail in the Eighth Amendment of the United States Constitution has been assumed to have application to the states through the Fourteenth Amendment (*Schilb* v. *Kuebel,* 404 U.S. 357, 365 [1971]), and lower courts have so held. *E.g., Sistrunk* v. *Lyons,* 646 F. 2d 64, 71 (3rd Cir. 1981); *Pilkinton* v. *Circuit Court,* 324 F. 2d 45, 46 (8th Cir. 1963); *see Parker* v. *Roth,* 202 Neb. 850, 278 N.W. 2d 106, 110, *cert. denied,* 444 U.S. 920 (1979). It is generally held, however, that the prohibition against excessive bail does not include, by implication, an absolute right to bail in all non-capital cases. *United States* v. *Edwards, supra,* 430 A. 2d at 1325-1331; *Mastrian* v. *Heilman,* 326 F. 2d 708, 710-711 (8th Cir.), *cert. denied,* 376 U.S. 965 (1964); *United States ex rel. Hyde* v. *McMann,* 263 F. 2d 940, 943 (2d Cir.), *cert. denied sub. nom. United States ex rel. Hyde* v. *Lavallee,* 360 U.S. 937 (1959);

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(C)

We are not unmindful of the deleterious effects that pretrial detention may have on a juvenile, nor do we

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State v. *Norcross*, 26 Ariz. App. 115, 546 P. 2d 840, 842 (1976); *Bellamy* v. *Judges*, 41 AD 2d 196, 342 N.Y.S. 2d 137, 139 (1st Dept.), *aff'd*, 32 NY 2d 886, 346 N.Y.S. 2d 812, 300 N.E. 2d 153 (1973). *Contra Trimble* v. *Stone*, 187 F. Supp. 483 (D.D.C. 1960). The State may therefore provide bail in some cases and deny it in others. *United States ex rel. Covington* v. *Coparo*, 297 F. Supp. 203, 206 (S.D.N.Y. 1969); *Parker* v. *Roth*, *supra*, 278 N.W. 2d at 110-13. "If that is so, it logically follows that bail might constitutionally be kept out of an entire system." M. Guggenheim, *Paternalism, Prevention and Punishment: Pretrial Dentention of Juveniles*, 52 N.Y.U. L. Rev. 1064, 1081 (1977).

The bail provision of the New York Constitution (Art 1, § 5: "Excessive bail shall not be required ...") does not mandate release on bail in all cases; it is left to the Legislature to determine in what cases bail is to be allowed as of right and in what cases the grant or refusal of bail is confided to the sound discretion of the court. *People ex rel. Shapiro* v. *Keeper of City Prison*, 290 N.Y. 393, 49 N.E. 2d 498 (1943). Juveniles are not entitled to bail in Family Court proceedings. *People ex rel. Wayburn (Richard L.)* v. *Schupf*, 47 AD 2d 79, 365 N.Y.S. 2d 235, 238-239 (2d Dept. 1975); *Matter of Kenneth D.*, 102 Misc 2d 363, 423 N.Y.S. 2d 423, 426 (Fam. Ct., Kings Co. 1979); *see* M. Guggenheim, *Paternalism, Prevention and Punishment*, *supra*, 52 N.Y.U. L. Rev. at 1082 ("Beyond the general criticisms which can be leveled against bail, the use in juvenile systems would result in a substantial number of juveniles being detained simply because they cannot afford to post bail.").

We note also that "[v]irtually every court which has considered the issue has found that juvenile code safeguards obviate the need for a right to bail in juvenile pre-adjudication proceedings". *L.O.W.* v. *District Court*, *supra*, 623 P. 2d at 1258. New York juvenile justice procedures, as prescribed by the Family Court Act, are, we submit, no exception.

denigrate their significance. At least as equally important, however, is the right of the community to protect itself from criminal behavior. Such right justifies preventive detention in the first instance. As a judge of the New York Family Court testified at trial (JA: 598-99): "[I]n my experience in New York City, we do have situations where, if for no other reason but for the protection of the community, we must have some means in certain cases for detention." FCA, section 320.5(3)(b), which, as noted, "is designed to avoid any routine detention of a child", recognizes that need and does so with do regard for fundamental fairness and the rights of the juveniles involved.

CONCLUSION

The judgment appealed from should be reversed and the petition dismissed, with costs.

Respectfully submitted,

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No. 82-1278

IN THE

Supreme Court of the United States

October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR INTERVENOR-APPELLANT

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Questions Presented

1. Does the standard permitting court-ordered detention of an accused juvenile delinquent in New York Family Court Act § 320.5(3)(b), a judicial finding of serious risk of pretrial crime supported by facts and reasons stated on the record, satisfy a detained juvenile's right to due process of law?

2. Do the procedural protections an accused juvenile delinquent receives at initial appearance, which include all the protections available at arraignment in New York, and the finding of probable cause after adversary hearing he is entitled to receive within six days of a detention order afford a juvenile detained under § 320.5(3)(b) due process of law?

3. Does § 320.5(3)(b) deny accused juvenile delinquents due process of law if the criminal charges against some of the juveniles detained under the statute are subsequently withdrawn or dismissed and the dispositional orders for others, who are adjudicated delinquent, do not require them to be sent away from home?

4. May a federal writ of habeas corpus release accused juvenile delinquents from pretrial detention who were not ordered detained or in custody until after the writ was granted?

Parties

The caption includes the names of the parties in the court that issued the judgment on appeal except that appellant Ellen Schall, as Commissioner of the New York City Department of Juvenile Justice, has been substituted for Paul Strasburg, as Commissioner of the New York City Department of Juvenile Justice, the respondent-appellant below. Former Commissioner Strasburg resigned his office on November 17, 1982. Ms. Schall was appointed Commissioner on December 28, effective on January 10, 1983.

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Opinions and Judgments Below

The majority and concurring opinions and the judgment of the Court of Appeals (A. 95-123*) are reported *sub nom. Martin* v. *Strasburg* at 689 F.2d 365 (1982).

The June 1, 1981 judgment of the United States District Court for the Southern District of New York (A. 93) and its August 5 clarifying memorandum (A. 94) are not reported. The April 17, 1981 opinion of the district court in support of the judgment (A. 36-92) is reported *sub nom. United States ex rel. Martin* v. *Strasburg* at 513 F. Supp. 691 (1981). The April 3, 1978 interlocutory opinion of the district court (A. 20-32) is not reported.

Jurisdiction

Jurisdiction is conferred by 28 U.S.C. § 1254(2). The judgment on appeal (A. 95) is from the United States Court of Appeals for the Second Circuit, and it held New York Family Court Act § 739(a)(ii), now § 320.5(3)(b), invalid under the due process clause of the Constitution.

The Court of Appeals filed its judgment on September 20, 1982. A. 7. Intervenor-appellant Abrams filed his notice of appeal (A. 124) on October 20. A. 7. On December 10, this Court extended the time in which to docket the appeal from December 20, 1982 to January 24, 1983. Supreme Court Order No. A-521; Supreme Court Rule 29(1). Intervenor docketed his appeal (No. 82-1278) on January 24, and appellant Schall docketed her appeal (No. 82-1248) on that date. On April 18, this Court noted probable jurisdiction over both appeals and consolidated them. —— U.S. ——, 103 S.Ct. 1765.

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* References preceded by "A." are to pages in the joint appendix filed on this appeal.

State Statute Involved

New York Family Court Act § 320.5 states in part:

> *The initial appearance; release or detention*
>
> 1. At the initial appearance, the court in its discretion may release the respondent or direct his detention.
>
> • • •
>
> 3. The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:
>
> • • •
>
> (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.[*]

Statement of the Case

A. Pretrial Release or Detention under Family Court Act § 320.5 and Juvenile Delinquency Proceedings in New York

Pretrial release or detention under New York Family Court Act ("FCA" or "the Act") § 320.5 is decided at an accused delinquent's initial appearance in Family Court. FCA § 320.4(2)(a).* Initial appearance follows the filing

[*] Section 320.5 was enacted by L. 1982, c. 920, § 1, eff. July 1, 1983 (1 McKinney's Session Law News of New York at 1982-148 [Jan. 1983]). Subsections 1 and 3(b), set forth above, repeat the relevant text of § 739(a)(ii), the statute involved before July 1. (The text of § 739[a][ii] in force between November 24, 1976 and July 1, 1983 is set forth in intervenor's jurisdictional statement, p. 2, and in McKinney's Consolidated Laws of New York, Book 29A-Judiciary [Part 1] Court Acts [1982-83 Supp.].) Section 739(a)(ii) was considered below only in relation to the pretrial detention of accused juvenile delinquents (A. 20-23, 30-32, 33-35, 36-92, 96-122), the context in which § 320.5 is now controlling.

* Sections 320.4 and 320.5 are included in article 3 of the Act. The article, entitled *Juvenile Delinquency*, was added by L. 1982, c. 920, § 1 (1 McKinney's Session Law News of New York at 1982-148 [Jan. 1983]), and amended by L. 1982, c. 926 (*id.* at 1982-255),

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of a delinquency petition and is required in all cases. FCA § 320.1.* If a juvenile is in detention, his initial appearance is within seventy-two hours or on the next court day after the petition is filed, whichever is earlier. § 320.2(1).** If a juvenile is not in detention, i.e. he was

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and by L. 1983, c. 398, §§ 1-50, all effective on July 1, 1983 (hereafter "article 3" or "the July 1, 1983 amendments"). Article 3 recodifies the delinquency provisions formerly in article 7, including § 739(a)(ii), now § 320.5(3)(b), the statute involved in this appeal, and revises some of them. Some new terminology is introduced. For example, initial appearances were formerly called "§ 739 hearings," "§ 739 detention hearings" or "arraignments" and are so variously identified in the proceedings below. (Other revisions of interest are noted in the ensuing discussion.) Under both prior and current law in New York, the specialized and principally habilitative purposes of the Family Court, the non-criminal character of delinquency proceedings and the need to provide the juveniles involved in those proceedings with due process of law are recognized. *See generally Eddings* v. *Oklahoma*, 455 U.S. 104, 116 n. 12 (1982); *In re Gault*, 387 U.S. 1, 14-15 (1967); *Kent* v. *United States*, 383 U.S. 541, 554-55 (1966).

* A delinquency petition must charge a juvenile between 7 and 16 (at the time of the conduct in issue) with one or more acts that would be crimes, i.e. felonies or misdemeanors, if committed by an adult. FCA §§ 301.2(1), 311.1(2), 3(c); New York Penal Law § 10.00(6). Facts supporting each element of the crimes charged and the juvenile's commission of them must be alleged and sworn to by a person, or persons, with direct knowledge of the events. FCA §§ 311.1(3)(h), (4), 311.2 (requirements codified by July 1, 1983 amendments). See testimony of Hon. Cesar Quinones ("Quinones"), A. 251-52 (pre-codification practice). For this reason, delinquency petitions in New York provide probable cause (§ 311.2[2]; *Gerstein* v. *Pugh*, 420 U.S. 103, 111-12, 120 [1975]), and must be dismissed if they do not. FCA § 315.1.

** A juvenile may be detained briefly after arrest and before initial appearance by police and local juvenile detention agencies like the New York City Department of Juvenile Justice administered by appellant. Police may detain only in special circumstances for a reasonable period, e.g. to complete questioning. FCA § 305.2(4)(b), (6), (8). Local juvenile detention agencies may detain (commonly following a police referral) if it appears the facts leading to the juvenile's arrest support a delinquency petition and several other conditions are met. The agency must find that there is a substantial probability the juvenile will not appear in court or a serious risk he will commit a pretrial crime, the two detention standards applied by the Family Court under the Act, *and* either the juvenile's conduct involved the use or threatened use of force or there is reason to believe that a delinquency proceeding is pending against him. FCA § 305.2(4)(c); Uniform Fam-

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not referred to or accepted by a local detention agency after his arrest (*see* p. 3 n.**), his initial appearance is within ten days after the petition is filed absent good cause shown. § 320.2(1). As at all hearings in New York Family Court, the juvenile is present at initial appearance and represented by counsel. §§ 320.2(2), 320.3, 341.2(1). He has the right to remain silent and to notification of his parents or the person responsible for his care ("the parent"), but the hearing may proceed without the parent after substantial efforts have been made to notify him. §§ 320.3, 341.2(3).* Initial appearance, again as all Family Court hearings, is stenographically recorded. *See* testimony of Hon. Cesar Quinones ("Quinones"), A. 252-54, 256, called by intervenor at the trial below, and of Steven Hiltz ("Hiltz"), A. 128, called by appellees.**

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ily Court Rules, 22 New York Codes, Rules and Regulations ("NY CRR") § 2507.1(c); 9 NYCRR § 180.7(d)(3) (detention agencies). *See* testimony of Michael Bigley ("Bigley"), A. 164, 175, and Ralph E. Kelly ("Kelly"), A. 286, 298-302, 305, both called by intervenor at the trial below. (At the time, Mr. Bigley was Director of Detention Services of the New York State Division for Youth [A. 154], and Mr. Kelley, Deputy Commissioner for Operations of the New York City Department of Juvenile Justice [A. 283].) *See also* State's Exhibits ("SX") B1, K, L, A. 331, Record on Appeal Document Number ("R. Doc.") 26 (New York City Department of Juvenile Justice materials used to screen juveniles for pre-court detention).

A juvenile detained by the police or a local juvenile detention agency is entitled to a '72 hour' or 'next day' court hearing even if a delinquency petition has not yet been filed. *See* FCA §§ 307.3(4), 307.4 (providing for pre-petition detention hearing with essentially the same procedural rights and the same detention standards as at initial appearance).

* In New York, juveniles and adults accused of crimes have essentially the same procedural and evidentiary rights. *See, e.g., People ex rel. Guggenheim (Robert P.)* v. *Mucci*, 32 N.Y.2d 307, 312, 313 (1973); *Matter of Gregory W.*, 19 N.Y.2d 55, 64 (1966); *Matter of Robert P.*, 40 A.D.2d 638, 638-39 (1st Dept. 1972). Thus, sections of the Family Court Act, including FCA §§ 320.2, 320.3, are construed in light of the New York Criminal Procedure Law ("CPL"), McKinney's Consolidated Laws of New York, Book 11A, which is controlling in the state's adult criminal courts. *See* FCA § 303.1.

** Judge Quinones had been on the New York Family Court bench for 10 years at the time of trial and had presided in all Parts, including Intake where initial appearances are held. A. 246-47. He had

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At the outset of his initial appearance, the juvenile, represented by counsel, is read the charges and provided with a copy of the delinquency petition. FCA §§ 320.3, 320.4(1). He may then challenge the sufficiency of the petition, e.g. for failure to provide probable cause (§§ 311.2 [2], 315.1; A. 255 [Quinones]; *see* p. 3 n.*), and pleads to it if it is not dismissed. §§ 321.1, 321.3* A representative of the presentment agency (a city corporation counsel, county attorney or district attorney) is in court to support the petition and to request the juvenile's detention under § 320.5(3) if he believes it necessary. § 301.2(12). A representative of the local probation service is also present. A. 128, 129 (Hiltz); A. 252-53 (Quinones). He may be the probation liaison officer to the court, the juvenile's own probation officer or the officer who interviewed him during probation's pre-court review of the case. A. 253 (Quinones).** The officer reports the juvenile's 'record,' i.e. his prior and

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also spent 26 months assigned to the New York City Criminal Court and was familiar with adult arraignments. A. 246, 259. He identified arraignments as procedurally similar to initial appearances in Family Court. A. 259.

Mr. Hiltz, an attorney, specialized in juvenile justice matters when he was with the Legal Aid Society in New York City. A. 128. He left the Legal Aid Society in June 1979, just before appellant's agency became operational. A. 139.

* A legally sufficient petition may also be dismissed at initial appearance. *See* FCA § 315.2 (dismissal in furtherance of justice). In addition, it may be adjourned in contemplation of dismissal (§ 315.3) or referred to the probation service (where the case was considered before the petition was filed) for adjustment, i.e. informal resolution resulting in dismissal. §§ 320.4(2)(b), 320.6 and p. 5 n.**.

** The local probation service conducts a pre-court review, or probation intake, in all delinquency cases. The review has fact-gathering, conciliation and advisory purposes. The juvenile's court and probation records are obtained and examined. Testimony of Hubert Benjamin ("Benjamin"), A. 142, 143-44, called by appellees at the trial below. (Mr. Benjamin had then been with the New York City Probation Department for 30 years. A. 141.) The juvenile is interviewed (if he waives his right to remain silent) by a probation officer who is an experienced social worker. A. 142, 145, 147-48 (Benjamin). The juvenile's parent, the complaining witness or victim, and the arresting officer are also interviewed if they are willing to appear.

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current Family Court and probation contacts, and any known police contacts. § 308.1(6); A. 254 (Quinones), testimony of Hubert Benjamin ("Benjamin"); A. 144, called by appellees at the trial below. *See* p. 5 n.**. The officer also reports any relevant information obtained from probation's pre-court review, e.g. the kind of supervision the juvenile receives at home, his response to it, his attendance at school, his special medical or developmental problems. A. 143-44 (Benjamin); A. 254 (Quinones).* The probation officer concludes by offering his agency's recommendation about the juvenile's pretrial release status. A. 143-44, 149-50 (Benjamin); A. 254 (Quinones). The recommendation is not required in designated felony cases.**

FCA § 308.1(11); A. 142 (Benjamin). During the review, probation may adjust, i.e. informally resolve, a suitable case with the consent of the complainant and juvenile (and the approval of the court and presentment agency if certain felonies are charged). FCA § 308.1(2)-(4), (8), (13); 22 NYCRR §§ 2507.3-2507.6; A. 143, 148 (Benjamin). Absent adjustment, probation reports the information it has obtained to the judge presiding at initial appearance (or at the pre-petition FCA § 307.4 hearing) and offers its recommendation about the juvenile's pretrial release. § 308.1(6); A. 143-44, 149-50 (Benjamin). None of the information probation obtains during its pre-court review may be admitted at fact-finding, the hearing which determines whether the juvenile committed the crimes alleged in the petition. §§ 301.2(6), 308.1(6).

* The judge presiding at initial appearance must order a medical examination of any juvenile he believes may be incapacitated because of mental illness, retardation or developmental disability. FCA § 322.1. Specialized proceedings follow. § 322.2.

** In New York, felonies are divided into six classes, A-I, A-II and B through E, according to the length of sentence. *See* I. Schwartz, *New York Sentence Charts 1983*, Charts I, II, V (with New York Penal Law, McKinney's Consolidated Laws of New York, Book 39). Designated felonies are a Family Court classification. FCA § 301.2(8). The Family Court designated felonies with their Penal Law felony classes, which include some, but not all, A-I through E felonies, are: (i) murder 1 (A-I), murder 2 (A-I), kidnapping 1 (A-I) and arson 1 (A-I), if committed by a juvenile 13, 14 or 15; (ii) manslaughter 1 (B), rape 1 (B), sodomy 1 (B), aggravated sexual abuse (B), kidnapping 2 (B) where the abduction involved the use or threat of deadly physical force, arson 2 (B), robbery 1 (B) and assault 1 (C), if committed by a juvenile 13, 14 or 15; (iii) attempted murder

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When a judge presiding at initial appearance decides whether to release or to detain a juvenile pending fact-finding, the hearing that determines if the juvenile committed the crimes alleged in the delinquency petition (FCA § 301.2[6]), he applies both the Act's general purpose section, 301.1, and its release and detention section, 320.5. Section 301.1 requires the judge (in all his delinquency decisions) to consider both the "needs and best interests" of the juvenile and the "need for protection of the community."* Section 320.5 provides the judge with the discretion to detain the juvenile but only within the express constraints it imposes on his decision-making. Subsection (3) of § 320.5 first establishes an express preference for release which the judge must overcome, i.e. the "court shall not direct detention unless" it makes certain findings. Subsection (3)(a) and (3)(b) then require him to find either a substantial probability the juvenile will not appear for fact-finding or a serious risk he will commit a crime before it is held, the specific subsection here involved. Subsection (3) further requires that "facts and

1 (B), attempted murder 2 (B), and attempted kidnapping 1 (B), if committed by a juvenile 13, 14 or 15; (iv) burglary 2 (C) and robbery 2 (C), if committed by a juvenile 14 or 15 and there has been a prior finding by the court that the juvenile previously committed an act which, if committed by an adult, would be robbery 2, assault 2 or any of the preceding designated felony acts, regardless of the juvenile's age at the time of the prior act; and (vi) any crime other than a misdemeanor committed by a juvenile at least 7 but less than 16, if there have been two prior findings by a court that the juvenile committed a prior felony.

* Both considerations were codified by the Juvenile Justice Reform Act of 1976. L. 1976, c. 878, § 2, eff. July 26, 1976. Judge Quinones testified that the need to protect the community is the preeminent consideration when detention is ordered on a finding of serious risk of pretrial crime, but that the juvenile's interests are also served by the order because he is kept crime-free during the detention period. A. 269-70. Judge Quinones also testified that the juvenile's needs become preeminent at the post-trial disposition stage when his long-term habilitation is considered. A. 279-80. The community's interest is also served at that time by the disposition's intended outcome.

reasons" for a finding under either the nonappearance or serious risk of crime standard be stated on the record.*

Both detention standards were enacted in 1962 with the Family Court Act. L. 1962, c. 686, eff. Sept. 1, 1962. Their adoption was in specific response to the problem of "routine" and "unnecessary detention" the Legislature found to exist under prior law. *Report of Joint Legislative Committee on Court Reorganization, No. 2—Family Court Act*, 1962 McKinney's Session Laws of New York 3428, 3438.** In 1976, the Legislature added the "facts and reasons" requirement for detention under either standard. FCA § 320.5(3), formerly § 739(a), as amended by L. 1976, c. 880, § 8, eff. Nov. 24, 1976. The amendment was intended to further the original purpose of the standards and to improve judicial decision-making "while providing a basis for review of the individual case, guidance for others who will later deal with the [juvenile] and legislative review of detention practices." Practice Commentary to FCA § 739, McKinney's Consolidated Laws of New York, Book 29A-Judiciary (Part 1) Court Acts (1982-83 Supp.) at 369.†

* The pretrial period considered under FCA § 320.5(3)(a) and § 320.5(3)(b) is the time between initial appearance, or the filing of a delinquency petition which immediately precedes initial appearance, and fact-finding for juveniles on release status. A. 259-63 (Quinones). Under the speedy trial guidelines (*see* § 310.2) in effect at the time of the trial below, the maximum period between petition, or initial appearance, then § 739 hearing, and fact-finding was 90 days. A. 260 (Quinones). The maximum period between initial appearance and fact-finding is now 120 days. *See* p. 11 n.**.

** Prior law permitted pretrial detention of juveniles in the interests of justice. It also allowed pretrial release with or without bail. Children's Court Act, L. 1922, c. 547, § 20, as amended by L. 1930, c. 393 (applicable outside New York City); Domestic Relations Court Act, L. 1933, c. 482, § 81 (applicable within New York City). Consideration of bail was eliminated in 1962 when the Family Court Act was adopted. *See also People ex rel. Wayburn (Richard L.) v. Schupf*, 47 A.D.2d 79, 81-82 (2d Dept. 1975) (Family Court without power under the Act to grant bail to juveniles).

† As appears from the preceding discussion, pretrial detention under FCA § 320.5(3)(a) and § 320.5(3)(b) is specific to New York's interests in delinquency proceedings, appearance for trial and protection of the community and the juvenile from the risk of criminal behavior in the interim. Removal of a juvenile from his home for his benefit, e.g. to treat him for mental illness, to protect him from abuse and neglect, is not involved, and is considered in the non-delinquency related provisions of the Act. *See* A. 157, 165, 167, 180-81 (Bigley); A. 268-70 (Quinones).

To decide if a detention finding under FCA § 320.5(3)(b), serious risk of pretrial crime, is warranted in a particular case, the judge presiding at initial appearance considers the nature and seriousness of the charges and whether they evidence a lack of self-control amounting to disregard for the safety or property of others; whether the charges will probably be proved at fact-finding; the juvenile's prior record, with special weight given to recent court and probationary contacts; the adequacy and effectiveness of the juvenile's supervision at home; his response to school authorities, if known; the time of day the alleged crime was committed as evidence of its seriousness and of the effectiveness of parental control; and any special circumstances, e.g. developmental disability, which are present. A. 263-67 (Quinones).* The relevant facts are provided by the delinquency petition, opposing counsel, the probation officer, the victim or complainant, the juvenile's parent and other interested persons who are present. The witnesses need not be sworn or subject to cross-examination, and hearsay inadmissible at fact-finding may be considered. The juvenile is entitled to challenge any information or recommendation and to offer proof and produce witnesses on his own behalf. A. 255-58 (Quinones). If, on the basis of facts and reasons so established, the pre-

* Judge Quinones testified that there are juveniles who repeatedly commit crimes and appear in Family Court, i.e. they are potentially detainable under FCA § 320.5(3)(b) and not under § 320.5(3)(a) (substantial probability of nonappearance). A. 250-51. He also testified, based on his 10 years on the Family Court bench, that the areas he considers, enumerated above, are common to the deliberations of his colleagues under § 320.5(3)(b). A. 264.

Hon. Margaret Driscoll, called as a witness by intervenor at the trial below, agreed that there are recidivist juveniles for whom pretrial preventive detention is appropriate. A. 311-12, 316, 325. She also testified that she relied on essentially the same considerations as Judge Quinones in deciding whether to release or detain juveniles accused of crimes under the Connecticut standard requiring strong probability of pretrial crime. *See* A. 319-22, 327-28. At the time of trial, Judge Driscoll had made some 1500 to 2000 decisions under the Connecticut standard in her 12 years on that state's Juvenile Court and Superior Court bench. A. 308-309, 315. She was then also Chairman of the Standards Committee of the National Advisory Committee on Juvenile Justice and Delinquency Prevention. A. 311, 322.

siding judge finds that there is a serious risk that the juvenile before him will commit a pretrial crime, he immediately issues a detention order.*

The detention order directs a local detention agency, like the New York City Department of Juvenile Justice ("DJJ") administered by appellant, to take custody of the juvenile. A. 18-19.** Agency personnel, not the Family Court, then decide whether the juvenile is to be detained securely or nonsecurely. A. 164-65 (Bigley); A. 286-87, 302 (Kelly).† No particular crime, or combination of crimes, alleged in the delinquency petition foreclose the nonsecure option (A. 182 [Bigley]; A. 301-302 [Kelly]), and all agency decisions must conform with state policy that juveniles who

* Pretrial detention orders are commonly reviewed by writ of habeas corpus brought in the state Supreme Court. The Supreme Court judgment is appealable as of right and may be taken directly to the Court of Appeals if only a constitutional question is presented. New York Civil Practice Law and Rules § 5601(b)(2). Permissive appeals may also be pursued to the Appellate Division, New York's intermediate appellate court, from the Family Court order. FCA § 365.2. Motions for reconsideration may be addressed to the Family Court at any time. § 355.1(1)(b).

** The detention facilities operated by the local agencies are certified, regulated, and partially funded by the state through its Division for Youth ("DFY"). New York Executive Law §§ 510-a, 530; FCA § 304.1(1); 9 NYCRR parts 174, 176, 180; A. 157-58 (Bigley). DFY operates only one detention facility directly. A. 157.

† Secure detention is in a locked facility which is self-contained, i.e. education, recreation, meals, counselling and medical care are provided on the premises. FCA § 301.2(4); 9 NYCRR § 180.9; A. 162 (Bigley); A. 285 (Kelly). Spofford Juvenile Center, the secure facility in New York City, and Monroe County Children's Center, the secure facility in that county, are shown in photographs included in the record on appeal. Petitioners' Exhibit ("PX") 31a-j, A. 331, R. Doc. 26 (Spofford); SX E1-23, A. 331, R. Doc. 26 (Monroe).

Nonsecure detention is in an open, community-oriented setting, e.g. in a group home or family boarding home. FCA § 301.2(5); 9 NYCRR § 180.10; A. 285 (Kelly). Education is provided by local schools. Supervision, monitoring of medical needs and meals are provided by the house parent. Social work services are provided by the local agencies.

need to be detained, be held in the least restrictive environment. 9 New York Codes, Rules and Regulations § 180.7 (d)(3); A. 174-75, 180 (Bigley).*

A detained juvenile is entitled to a probable cause hearing within six days (three calendar days plus one adjournment of three court days for good cause shown) of an order under FCA § 320.5(3)(a) or § 320.5(3)(b) if he denies the charges against him at initial appearance. § 325.1(2), (3), formerly § 739(b). He is also entitled to an expedited fact-finding within seventeen days (fourteen days plus one three day adjournment for the court or presentment agency for good cause shown) in class A, B and C felonies (*see* p. 6 n.**) and within six days (three days plus one three day adjournment for the court or presentment agency) for all other crimes. § 340.1(1), (3)(a).** If the time for

* In New York City, social workers in DJJ's Court Assessment Unit make the secure/nonsecure decisions on court-ordered detentions. A. 286, 288-89 (Kelly). They interview the juvenile and person(s) responsible for his care as well as probation officers and social workers who know him (if they are available). A. 286-87, 298 (Kelly). They review the circumstances of the current petition; the juvenile's court and probation history, including his prior detention experience; his medical and psychological problems; his school attendance, behavior and achievement (if available); and any other factors which bear on the appropriateness of secure or nonsecure detention and the juvenile's adjustment to it. A. 298-302 (Kelly); SX B2, A. 331, R. Doc. 26 (Court Assessment Unit Screening Form); SX I, A. 331, R. Doc. 26 (Guide for Preparing Court Assessment Unit Screening Form).

DJJ, like other juvenile detention agencies, also makes a secure/nonsecure decision for a juvenile it admits (for up to 72 hours) before a court appearance. *See* p. 3 n.**. A similar (but more abbreviated) case review made by experienced juvenile counselors precedes that decision. A. 298-302 (Kelly); SX B1, A. 331, R. Doc. 26 (Spofford Juvenile Center Screening Form); SX K, A. 331, R. Doc. 26 (Spofford Juvenile Center Screening Procedures Manual); SX L, A. 331, R. Doc. 26 (Spofford Juvenile Center Outline of Interview with Juvenile and Parent).

** The presentment agency is allowed additional, reasonable time if either homicide is alleged or the injuries a witness received prevent him from appearing in court. FCA § 340.1(3)(a). The detained juvenile is allowed an adjournment of up to 30 days in all cases for good cause shown. § 340.1(3)(b). Non-detained juveniles proceed to fact-finding within 120 days of initial appearance (60 days

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probable cause hearing and expedited fact-finding coincide, the two hearings are merged, and the judge there presiding must make the probable cause finding within the six day time constraint. § 325.1(2), (3). If the time for probable cause hearing and expedited fact-finding do not coincide, a separate probable cause hearing is conducted. §§ 325.1-325.3, formerly § 739(b). The presentment agency opens the hearing and offers evidence on every element of the crimes charged and the juvenile's commission of them. §§ 325.2(1)(a), 325.3(1). The juvenile has the right to testify on his own behalf, § 325.2(1)(b), and he may call witnesses and introduce evidence unless the presiding judge denies him the opportunity for good cause shown, e.g. protection of an informant's identity. § 325.2(1)(c). Witnesses are sworn (unless the oath would be excused at fact-finding) and are subject to cross-examination. § 325.2(2). Only non-hearsay evidence is admissible, except scientific reports and statements of accepted reliability may be received subject to the juvenile's objection and a ruling directing that the appropriate witness be produced for examination. § 325.2(3).* The hearing must be concluded within two days or the juvenile released from detention. §§ 325.2(4), 325.3(4).** If the presiding judge finds probable cause, he must also decide whether the juvenile's continued detention is necessary. § 325.3(3). FCA § 325.3(3) requires that decision be made under § 320.5, necessarily including the section's preference for release, the two detention standards of subsections (3)(a) and (3)(b), and the requirement

plus one adjournment of up to 30 days for the court or presentment agency and the juvenile for good cause shown). § 340.1(2), (3)(a), (b). The 60 and 30 days period were added by the July 1, 1983 amendments. Invoked to their outer limits, they extend the speedy trial guidelines effective in New York City at the time of the trial below from 90 days from petition or § 739 hearing. A. 260-61 (Quinones), to 120 days from initial appearance. *See* p. 8 n.*.

* The procedures followed at probable cause hearings in Family Court and proof required to support an affirmative finding are the same as at probable cause hearings on felony complaints in adult criminal court. *Compare* FCA § 325.2 *with* CPL § 180.60.

** The 2 court days are included in the 6 days that FCA § 325.1(2) and (3) allow between initial appearance and probable cause. *See* § 325.3(4).

that the facts and reasons supporting the application of either standard be stated on the record. *See* pp. 7-8.

A separate dispositional hearing follows a fact-finding adverse to the juvenile, i.e. a finding of proof beyond a reasonable doubt that he committed the crimes alleged in the delinquency petition. FCA §§ 301.2(7), 342.2(2), 345.1, 350.1-350.4.* If, on a preponderance of the evidence received, the presiding judge concludes that the juvenile then needs "supervision, treatment or confinement", he finds the juvenile to be delinquent and enters an appropriate dispositional order. §§ 350.3(2), 352.1(1).** In all but designated felony cases (*see* p. 6 n.**), the judge must select the least restrictive disposition available that is consistent with the needs and best interests of the juvenile and the need to pro-

* If a juvenile is in post-trial detention, the dispositional hearing in a non-designated felony case (*see* p. 6 n.**) must commence within 10 days of an adverse fact-finding. FCA § 350.1(1). The court or the presentment agency may adjourn the hearing for up to 10 days for good cause shown. § 350.1(3)(a). The juvenile may adjourn it for up to 30 days for good cause shown. § 350.1(3)(b). Dispositional hearings for detained designated felons and for non-detained juveniles must commence within 50 days of an adverse fact-finding. § 350.1(2). The same adjournments are available to the court, presentment agency and the juvenile. § 350.1(3)(b). Additional time may be allowed in special circumstances. § 350.1(5).

** At a dispositional hearing, the court, presentment agency and juvenile may call witnessess, and the parties and the local probation service may advise the court about specific dispositional alternatives. FCA § 350.4(1)-(8). The probation service is also heard on the diagnostic assessment and/or probation investigation it is required to conduct in felony cases and may, but need not, conduct in misdemeanors. §§ 350.4(1), 351.1(1), (2). A probation investigation includes inquiries about the juvenile's family situation, his school adjustment, his response to prior social work assistance and prior psychiatric and psychological reports. § 351.1(1). A diagnostic assessment includes psychological tests and psychiatric interviews to determine mental capacity, achievement, disabilities and emotional stability. It includes, as well, a clinical assessment of any situational factors which may have contributed to the juvenile delinquent conduct and, when feasible, expert opinion about the risk the juvenile is to himself or others to assist the court in deciding his need for restrictive placement. § 351.1(1). *See* p. 14 n.**.

tect the community. § 352.2(2).* In designated felony cases, the judge must decide if restrictive placement, permitted only in these cases, is required before he considers any other disposition. § 353.5(1).** The reason for particular dispositions must be stated on the record in all cases, and find-

* Four dispositions are authorized: discharge on conditions, e.g. attending school regularly, for up to one year (FCA §§ 352.2[1][a], 353.1); probation for up to two years plus one year in exceptional circumstances after a further hearing (§§ 352.2[1][b], 353.2); placement with a local commissioner of social services or DFY for initial periods up to 12 months (misdemeanors) and 18 months (felonies) (§§ 352.2[1][c], 353.3[3]); and placement with those agencies for transfer to a facility specializing in the care of mental illness, retardation or developmental disability for up to one year subject to a further hearing. §§ 352.2(1)(d), 353.4. Restitution (if the juvenile is over 10) up to $10,000 and/or service to the public may be incidents of any disposition. § 353.6.

Placements under FCA § 353.3 are usually out-of-home and, at the direction of the court or in the discretion of a local agency or DFY, may include periods in secure, limited secure and non-secure facilities. *See* § 353.3(2), (3), (9); Executive Law §§ 502-510, 527; 9 NYCRR parts 168, 170, 171. (They may also be made to the juvenile's own home or to the home of a suitable person. FCA § 353.3[1].) All secure programs are operated directly by DFY. No placement is for "confinement" as distinguished from "supervision" and "treatment". §§ 301.2(7), 352.1(1).

Initial placement periods under FCA § 353.3(5) may be extended by the court for one year periods after further hearings until the juvenile is 18 and thereafter, with his consent, until he is 21. FCA § 355.3. The juvenile may also be discharged early by the court after hearing (§§ 353.3[6], 355.1) or by the placement agency. *See* § 353.3(9).

** The appropriateness of a restrictive placement depends on judicial consideration of the nature and circumstances of the crime, the age of the victim, the injuries received, if any, and the juvenile's history, in addition to his best interests and the community's need for protection. FCA § 353.5(2). If ordered, the juvenile goes to DFY for an initial period of not less than 3 years (class B and C designated felonies) or 5 years (class A designated felonies and multiple designated felony offenders). §§ 352.2(1)(e), 353.5(4)(a)(i), (5)(a)(i), (6). At least the first 6 months of a 3 year restrictive placement must be in a secure facility and at least 6 months thereafter in a residential facility. § 353.5(5)(a)(ii), (iii). At least the first 12 months of a 5 year restrictive placement must be in a secure facility and at last 12 months thereafter in a residential facility. § 353.5(4)(a)(ii), (iii). If the court allowed additional time in post-trial detention because of special circumstances, e.g. completion of an especially complex diagnostic assessment (*see* p. 13 n.**), the

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ings are required for restrictive placement. §§ 352.2(3), 353.5(1). If, on a preponderance of the evidence received, the judge presiding at the dispositional hearing concludes that the juvenile does not need "supervision, treatment or confinement", he must dismiss the petition (without a delinquency finding or a dispositional order) notwithstanding the prior adverse fact-finding. § 352.1(2).

B. Claims and Proceedings in the District Court

Gregory Martin commenced this proceeding for declaratory and habeas corpus relief in the United States District Court for the Southern District of New York on December 21, 1977. A. 1. He was detained under FCA § 320.5(3)(b), then codified as § 739(a)(ii), and claimed that the statute denied him due process and equal protection of the laws. Record on Appeal Document Number ("R. Doc.") 1 ¶¶ 6, 8-11. More specifically, Gregory alleged that he was denied due process because § 320.5(3)(b) punished detained juveniles without trial and required a "prediction" (A. 33 ¶ 1) of the likelihood of pretrial crime that was both inherently irrational and overbroad in that it included first offenders and juveniles who posed risks of trivial pretrial crimes. A. 33-34, 62; R. Doc. 15 ¶¶ 3-6 (Proposed Conclusions of Law for Appellees).* Gregory alleged he was denied equal

time is credited to the 6 month or 12 month secure confinement. §§ 350.1(5), 353.5(7).

Initial restrictive placement periods may be extended by the court after hearing until the juvenile is 21. FCA § 353.5(4)(d), (5)(d). A juvenile placed for 5 years may apply to the court for early release after 3 years. § 353.5(4)(b). DFY cannot discharge a restrictively placed juvenile without a court order. § 353.5(4)(c)(iii), (5)(c)(iii).

Without extensions, the maximum restrictive placement is about half as long as the corresponding juvenile offender sentence from an adult criminal court and about one-third to one-half as long as the corresponding prison term for an adult first offender. *Compare* § 353.5 *with* Penal Law §§ 70.00, 70.02, 70.05.

* Neither Gregory, nor the two other named appellees, Luis Rosario and Kenneth Morgan, challenged the New York procedures that provide probable cause at detention but do not require it to be found affirmatively until after an adversary hearing held within 6 days of detention. *See* pp. 3 n.*, 5, 11-12.

protection of the laws because § 320.5(3)(b) permitted preventive detention of juveniles when New York statutes did not authorize preventive detention of adults. A. 33, 62. Federal jurisdiction was based on 28 U.S.C. §§ 2241, 2254, and class certification sought. A. 9; R. Doc. 1 ¶¶ 2, 4.

The New York Family Court judge presiding at Gregory's initial appearance on December 14, 1977 ordered him detained on finding a serious risk Gregory would commit a crime before fact-finding if released. Petitioners' Exhibit ("PX") 1a, A. 331, R. Doc. 26.* The "facts and reasons" FCA § 320.5(3) requires to support a detention finding are stated in Gregory's delinquency petition, verified by the victim of the crime (PX 1b, A. 331, R. Doc. 26), and in the initial appearance transcript. PX 1a. Briefly summarized, Gregory was charged with robbery 1, assault 2 and criminal possession of a weapon 2 for an incident in which he, with two others, allegedly hit a youth on the head with a loaded gun and stole his jacket and sneakers. Gregory had the loaded gun when he was arrested; he lied to the police about where and with whom he lived; and the incident occurred at 11:30 at night, an hour when the presiding judge believed a fourteen year old, Gregory's age at the time, should have been at home. Gregory apparently had no prior record, i.e. contacts with the Family Court, but he had been warned by the police after an earlier incident.** Gregory's adver-

* Partial records of the delinquency proceeding against Gregory Martin and partial records of the delinquency proceedings against 33 other juveniles ("the juvenile case histories") were received as Petitioners' Exhibits 1-28, 35 and 43 at the district court trial below. A. 331. (They are included in Record on Appeal Document Number ["R. Doc."] 26.) The exhibits contain the transcripts of each juvenile's initial appearance, the proceeding at which pretrial release status is decided. *See* pp. 2-10. The exhibits usually indicate the outcome of probable cause, fact-finding and dispositional hearings but, except for Gregory Martin's probable cause hearing, do not contain the transcripts of these hearings.

** Eleven of the 34 juvenile case histories provided by appellees, in addition to Gregory Martin, involve arguable first offenders, i.e. juveniles who had no known prior or substantial current Family Court con-

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sary probable cause hearing was held on December 19 (*see* §§ 325.1, 325.2 and pp. 11-12), and probable cause found on all of the crimes charged. PX 1a (second transcript).*

tacts at the time of the initial appearances included in the histories. Two involve a single criminal charge: Ancrum (PX 35a, b), age 15, robbery 2 (allegedly stole gold chain from youth's neck and beat him at 2 a.m., had another delinquency petition pending); and Peebles (PX 14a, b), age 15, attempted arson 2 (allegedly set fire to neighboring apartment at 12:30 at night, mother said she could not help him). Nine involve multiple criminal charges: Ascencio (PX 12a, b), age 14, arson 2, reckless endangerment 2 (allegedly set fire to manned subway token booth at 12:30 at night, mother said he was truant); Basnight (PX 10a, b), age 14, robbery 1 and criminal possession of a weapon 2 (allegedly stole purse at gunpoint at 8:00 at night, incident occurred very substantial distance from juvenile's home); Cox (PX 7a, b) and Forde (PX 7a, e), both 13, multiple robbery, menacing and weapons charges (allegedly stole bus passes at knifepoint and with physical force in repeated incidents on the same day); Cruz (PX 11a, b), age 14, attempted murder 2, assault 1, reckless endangement 1 (allegedly pushed 77 year old man down stairs and beat him, detained under § 320.5 [3][a] [nonappearance] in addition to § 320.5[3][b]); Delgado (PX 19a, b), age 15, murder 2, manslaughter, criminal possession of a weapon (allegedly knifed 13 year old to death); McArthur (PX 6a, b), age 15, menacing, criminal possession of a weapon (allegedly pointed loaded, cocked gun at 13 year old); Rodriguez (PX 12a, b), age 14, arson 2 and reckless endangerment (allegedly set fire to manned subway token booth [with Ascencio above] at 12:30 at night, mother said he was truant; juvenile testified at trial below [T. 15, R. Doc. 26B] that had been arrested before); Santiago (PX 13a, b), age 12, robbery 1, assault, criminal possession of weapon and of stolen property (allegedly stole purse from 71 year old woman, knocking her against a brick wall, probation service subsequently reported juvenile had committed prior similar acts).

Probable cause was provided for all of the crimes listed above at detention by delinquency petitions verified by persons with first-hand knowledge of the events or supported by a deposition of the same character. *See* p. 3 n.*. Probable cause was also found after adversary hearing (*see* FCA §§ 325.1-325.3 and pp. 11-12) except in the instance of Forde who was released from detention when a courtroom was not available for the hearing. PX 7f.

Exhibits referenced above were received at A. 331 and are included in R. Doc. 26.

* Gregory received an adverse fact-finding (except on the assault count) on December 29, after expedited trial. PX 1c, A. 331, R. Doc. 26. *See* FCA §§ 340.1(1), (3) and pp. 11-13. He was put on 2 years probation at disposition. PX 1d, A. 331, R. Doc. 26, and pp. 13-14.

Luis Rosario and Kenneth Morgan joined Gregory as named petitioners in the federal proceeding on March 31, 1978. A. 9-10. Both fourteen year old boys had been detained at their initial appearances because of their serious risk of pretrial crime. PX 2a (Rosario), PX 3a (Morgan), A. 331, R. Doc. 26. Luis was charged with attempted robbery 1 and assault 2 for an incident in which he, with four others, allegedly tried to steal wallets from two men, putting a gun to the head of one of them and beating both on the head, back and legs with sticks. PX 2b, A. 331, R. Doc. 26. Luis was on release status on another pending petition (for knifing a youth) at the time of his initial appearance; he had three other, prior delinquency contacts with the Family Court; the incident in question occurred at approximately 11:15 at night; and the probation service recommended his detention. PX 2a. Kenneth was charged with attempted robbery and attempted grand larceny for an incident in which he, with another, allegedly tried to steal money from a couple, threatening to blow their heads off, and grabbing them to search their pockets. PX 3b, A. 331, R. Doc. 26. Kenneth, like Luis, was on release status on another petition (for robbery and criminal possession of stolen property) at the time of his initial appearance; he had been arrested five previous times; and his mother had refused to come to court because Kenneth had been in trouble so often she did not want him home. PX 3a, A. 331, R. Doc. 26.* Probable

* "Facts and reasons" supporting detention under FCA § 320.5 (3)(b) that include substantial current and/or prior Family Court contacts, i.e. 'criminal records,' are presented by 19 of the 34 juvenile case histories in addition to those of Luis and Kenneth. Three involve a single criminal charge: Harris (PX 16a, b), age 15, criminal possession stolen property 2, two other pending petitions; Taylor (PX 16a, e), age 14, criminal possession of stolen property 2 (with Harris), one other pending petition and one prior contact; and McCain (PX 15a, b), age 15, assault 3, four prior contacts. Sixteen involve multiple criminal charges: Allen (PX 27a, b), age 12, attempted robbery 1 and assault 1, six prior contacts; Dunaway (PX 21a, b), age 13, petty larceny and criminal possession of stolen property, one prior contact; Fargas (PX 26a, b), age 14, robbery 2, grand larceny, menacing, criminal possession of a weapon and of stolen property, one other pending petition and five prior contacts; Gomez (PX 20a, b),

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cause was found after adversary hearing in both cases. PX 2c (Rosario), PX 3c (Morgan), A. 331, R. Doc. 26.*

On April 3, 1978, the district court certified Gregory, Luis and Kenneth as representatives of a class of "all juve-

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age 15, robbery, assault, grand larceny and criminal possession of stolen property, one other pending petition and two prior contacts; Gregoire (PX 23a, b), age 15, burglary 3 and criminal possession of stolen property 2, six prior contacts; Hanna (PX 4a, e), age 14, criminal trespass 3, criminal mischief 4, two prior contacts; Jenkins (PX 4a, b), age 15, burglary 3, criminal trespass 3, criminal mischief 4 (with Hanna above), two other pending petitions and one prior contact; Jacobs (PX 28a, b), age 14, robbery and grand larceny, two other pending petitions, one prior contact; Lopez (PX 24a, b), age 13, burglary 3, criminal mischief 4, petty larceny and criminal possession of stolen property, one other pending petition and four prior contacts; McLaughlin (PX 43a, b), age 14, burglary 3, criminal possession of stolen property 4 and grand larceny, one prior contact; Melendez (PX 17a, b), age 15, burglary 3, criminal trespass 3, criminal mischief 2, one other pending petition and two prior contacts; Nelson (PX 22a, b), age 15, petty larceny and criminal possession of stolen property, one prior contact; Parson (PX 18a, b), age 15, promoting gambling 2 and possession of gambling devices, seven prior contacts; Price (PX 5a, b), age 13, attempted robbery 2, attempted assault and criminal mischief, two prior contacts; Ramos (PX 8a, b), age 15, burglary 3, petty larceny, criminal mischief and criminal possession of stolen property 3, eight prior contacts; West (PX 25a, b), age 14, grand larceny, jostling, criminal possession of stolen property and resisting arrest, six prior contacts.

Eight of the 19 juveniles, in addition to Luis and Kenneth, were on release status on other pending petitions at the time of the initial appearances included in the histories: Allen (PX 27a); Fargas (PX 2[illegible]); Gomez (PX 20a); Jenkins (PX 4a); Lopez (PX 24a); McC[illegible] (PX 15a); Melendez (PX 17a); and West (PX 25a). Seven were on probation from prior adverse fact-findings at the time of the initial appearances included in the histories: Dunaway (PX 21a); Fargas (PX 26a); Hanna (PX 4a); Jenkins (PX 4a); Nelson (PX 22a); Ramos (PX 8a); and West (PX 25a). Three, Fargas, Jenkins and West, were both on release status on other pending petitions and on probation from prior adverse fact-findings at the time of the initial appearances included in the histories.

Exhibits referenced above were received at A. 331 and are included in R. Doc. 26.

* Probable cause was found on all the crimes charged against Luis. PX 2c, A. 331, R. Doc. 26. (Appellees' exhibits do not provide any information about him thereafter.) Kenneth received an adverse fact-finding (merged with his probable cause hearing, *see* pp. 11-12) on lower charges, harassment and petty larceny, after an expedited trial. PX 3c, A. 331, R. Doc. 26. He was placed with a local commissioner of social services for 18 months at disposition. PX 3d, A. 331, R. Doc. 26.

niles [accused of crimes] who are now being held or will be held before these proceedings are concluded in pretrial detention" under FCA § 320.5(3)(b), then § 739(a)(ii). A. 32.* The proceeding was tried in March, 1980. Appellees called two expert witnesses whose testimony has not been previously referenced, Leslie T. Wilkins, an expert in "criminology[,] . . . prediction of behavior and statistics" (A. 188), and Lynnwood David Zinn, M.D., a child and adolescent psychiatrist. A. 230. Both witnesses were asked if they thought the "predictions" of future crime in the initial appearance transcripts of thirty-two of the thirty-four juvenile case histories in evidence (PX 1a-28a, A. 331, R. Doc. 26) would be accurate. A. 188 (Wilkins); 234 (Zinn). Mr. Wilkins said their accuracy would be "minimal," identifying the principal difficulty as not knowing what information the presiding judge had used or what weight he had attached. A. 189;** Dr. Zinn also thought the "predictions" in the transcripts would "not be accurate" (A. 234) and gave two reasons: First, as a medical professional, he said he was not called upon to predict behavior but only to make an "assessment of likely response . . . to treatment." *Id.* Second, he said the transcripts did not sufficiently address situational factors which might,

* Appellees argued that class certification was necessary to avoid mootness. R. Doc. 3, pp. 7-8; R. Doc. 6, pp. 20-27. Intervenor opposed, arguing that appellees' claims were "capable of repetition yet evading review" and could be fully litigated under that doctrine without class certification. R. Doc. 5, pp. 9-11. Contrary to the statement in the April 17, 1981 district court opinion (A. 70 n.29), neither intervenor nor appellant moved to dismiss this proceeding or *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682 (1976) (upholding FCA § 320.5[3][b], then § 739[b], under the Fourteenth Amendment), as moot. They took exactly the opposite view in both cases. *Wayburn, supra*, at 686.

** Mr. Wilkins expressed a generalized preference for empirical prediction over subjective decision-making although he was aware that no accurate empirical model had yet been developed for 'predicting' juvenile pretrial crime. A. 189-209. He also admitted his bias against juvenile preventive detention, stating that he had a "moral objection" to it. A. 219, 220.

or might not, provide support for the juvenile if he were released. A. 234-35. Both witnesses agreed that at least the following factors were reliable or generally accepted bases for informed judgment about the risk of crime: prior criminal record, unstable behavior illustrated by truancy, and family environment. A. 217-21 (Wilkins); 242-44 (Zinn).* Dr. Zinn also agreed that there were "at least some juveniles who will continue to engage in criminal behavior until they are stopped by the intervention of some societal authority." A. 244.

The April 17, 1981 opinion of the district court holds FCA § 320.5(3)(b), then § 739(a)(ii), invalid under the due process clause, both on its face and as applied. A. 92. The opinion advances three arguments in support of the holding. A. 69-91. First, § 320.5(3)(b) is said to permit the exercise of standardless judicial discretion in predicting pretrial crime, an event which, according to the court, is not amenable to reasoned decision in any circumstance. A. 69-81.** Prospective decisions required in bail are distinguished on the ground that they are made after "hearings" where "all possible relevant information" is available. A. 82. Second, although not put in issue by appellees, the potential six day delay between detention under § 320.5(3)(b) and an affirmative judicial finding of probable cause is said to violate the presumption of innocence. A.

* Mr. Wilkins observed, in addition, that the likelihood of future crime increases with each successive crime (A. 218), that the peak period for recidivism is 3 to 6 or 9 months after release from incarceration (A. 200-201), and that it was "reasonable to infer" that the same peak period would apply to release following arrest and initial appearance in Family Court. A. 201-202.

** *Kent* v. *United States*, 383 U.S. 541 (1966), is cited as authority for the conclusion that FCA § 320.5(3)(b) permits the exercise of standardless discretion. A. 70. The statute's express "facts and reasons" requirement for detention is not mentioned at any point. The allegedly brief period for which pretrial crime is 'predicted' under § 320.5(3)(b) is repeatedly cited (A. 65, 68, 84, 86, 88, 91) as supporting the irrational nature of the required judicial decision. On each occasion, the district court confuses the pretrial risk of crime period, then 90 days, now 120 days (*see* pp. 8 n.*, 11 n.**) with time constraints for probable cause hearings and expedited trial for detained juveniles.

86-88. Third, § 320.5(3)(b) is said to impose punishment without trial. A. 88-91. The statute's acknowledged crime prevention purpose is found inadequate as an "alternative purpose" under *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), on the ground that protecting the community from juvenile pretrial crime is indistinguishable from the purposes of the juvenile justice system as a whole. A. 90. Protecting the community is then accepted *arguendo* as an adequate "alternative purpose" under *Kennedy* v. *Mendoza-Martinez, supra,* but § 320.5(3)(b) found not "rationally . . . connected" to it because of the inability of judges to predict future crime. A. 90. The stigma that allegedly results from detention for unpredictable crimes and the potential six day delay in affirmative findings of probable cause are noted in further support of the punishment rationale. A. 89, 90-91.

The district court opinion rejects appellees' equal protection claim, finding FCA § 320.5(3)(b) not subject to scrutiny under the compelling state interest test. A. 63-68. Noting that the statute does differentiate between juveniles and adults, it concludes that such distinctions are "too ingrained" in the "network of laws that the states have devised to deal with the problems of the young—delinquency, neglect and care" to be considered under the heightened standard. A. 68.*

* The district court opinion says, in *dicta*, that FCA § 320.5(3)(b) would not survive strict scrutiny because New York's interest in the statute is inconsistent with the fact that the "overwhelming majority" of juveniles who are detained are put on probation or receive no 'sentences' at disposition. A. 65. This conclusion relies on 1977 tables from a court administration report (PX 38, A. 331, R. Doc. 26) and on similar tables (numbers 79-82) for 1979 (R. Doc. 26) which the district court obtained on its own initiative. These tables combine detentions under FCA § 320.5(3)(b) with detentions under § 320.5 (3)(a) (substantial probability of nonappearance) and do not match detentions with dispositions. They also combine pre-fact-finding detentions with post-fact-finding detentions. Additionally, the district court made extensive errors in classifying and transposing the data from the tables which materially affect its conclusions. *See* Brief for Intervenor-Appellant in the United States Court of Appeals for the Second Circuit, pp. 39-40, 53-55, detailing district court errors.

On June 1, 1981, the district court entered a declaratory judgment in conformity with its opinion and granted a writ of habeas corpus for the class. A. 93. In an August 5 clarifying memorandum, the court held that the writ was effective to release accused juvenile delinquents who entered appellant's custody after it issued and until the proceeding was concluded or until the judgment entered on June 1 was reversed. A. 94. An application by intervenor and appellant for a stay of the writ's future effect was denied by the Court of Appeals on September 22, 1982. A. 6.

C. Opinions of the Court of Appeals

The United States Court of Appeals for the Second Circuit affirmed the district court judgment (A. 93, 94 [August 5, 1981 clarifying memorandum]) insofar as it declared FCA § 320.5(3)(b), then § 739(a)(ii), facially invalid under the due process clause and allowed the future writ. A. 96, 113-14. The majority opinion (A. 96-116) opens its due process discussion with the observation that preventive detention, unlike failure to post bail or denial of bail, is not a recognized exception to the general rule that incarceration follows, rather than precedes, adjudication of criminal conduct. A. 109-10.* To allow it as an exception, the majority would require a showing of compelling government interest but finds it unnecessary to evaluate New York's interests in § 320.5(3)(b) in this light. A. 110-11. Under its reasoning, § 320.5(3)(b) is invalid, regardless of the strength of the state's interest in preventing juvenile crime, because the statute "is utilized principally, not for preventive purposes, but to impose punish-

* The decisions in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982), and *Blunt* v. *United States*, 322 A.2d 579 (D.C. App. 1974), both upholding the District of Columbia adult preventive statute under the due process clause, are not mentioned by the majority at this point. *Edwards* is referenced earlier in the opinion to show that the District of Columbia statute permits detention if the accused adult is charged with a listed "dangerous crime" or "crime of violence" whereas FCA § 320.5(3)(b) permits detention if the accused juvenile is charged with a felony or misdemeanor. A. 101 n.15.

ment for unadjudicated criminal acts." A. 111. *In re Winship*, 397 U.S. 358 (1970), requiring proof beyond a reasonable doubt at trial in delinquency proceedings, is cited as authority for this conclusion. A. 109, 112-13.

The opinion's due process analysis relies on the theory that short-term preventive detention before trial is unconstitutional punishment if it is not followed by long-term post-trial confinement in a majority of cases. A. 111-14.* To apply the theory, the opinion matches supposed FCA § 320.5(3)(b) detentions with subsequent dismissals at, or before, fact-finding and with post-disposition releases and concludes that § 320.5(3)(b) detentions outnumber post-trial placements (used synonymously for post-trial confinement) in the "vast majority" of cases and thus constitute punishment. A. 103, 111, 112.** Three different punishment

* The six factor test cited by the district court (A. 89-90) to distinguish regulatory denials of pretrial liberty from unconstitutional punishment is not mentioned. *See Bell* v. *Wolfish*, 441 U.S. 520, 537-38 (1979); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *United States* v. *Edwards*, 430 A.2d at 1331-33.

** The opinion (A. 102 n.18) uses two evidentiary sources for its comparisons, a study by the Vera Institute of Justice of 781 delinquency cases that were considered by New York City Family Court judges between April 1, 1977 and March 31, 1978 (Petitioners' Exhibit ["PX"] 44, A. 331, Record on Appeal Document Number ["R. Doc."] 26) and the 34 juvenile case histories (PX 1-28, 35, 43, A. 331, R. Doc. 26; *see* p. 16 n.*). Neither is suitable. The Vera Study does not simply provide an imprecise basis for the comparisons, as the opinion concedes (A. 102 n.18), it provides no basis at all. First, as the opinion notes (*id.*), the Study combines detentions that are relevant, i.e. those under FCA § 320.5(3)(b), with detentions that are irrelevant, i.e. those under § 320.5(3)(a) (substantial probability of nonappearance). No numerical (or other) means for distinguishing between the two kinds of detention, a constraint the comparisons require, is provided. Second, the Study does not report the number of pre-fact-finding detentions for the combined group followed by dismissals or post-disposition releases, other constraints on which the comparisons depend.

The 34 juvenile case histories also cannot be used to infer the relationships between FCA § 320.5(3)(b) detentions and dismissals or post-disposition releases for all delinquency proceedings in New York that the comparisons require. First, the 34 case sample is too small. *See Mayor* v. *Educational Equality League*, 415 U.S. 605, 620-21 (1974). Second, the sample is biased, i.e. it consists of delinquency proceedings from over a 3 year period (3/5/76 [Delgado, PX

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rationales are assigned. A. 111-12. Detentions under § 320.5(3)(b) followed by dismissals at, or before, fact-finding, are said to be punishment because they are based on weak or insufficient evidence (although probable cause is provided) and guilt is not determined. A. 111-12.*

19a] to 8/21/79 [Ancrum, PX 35a]) selected by appellees' attorneys with a view to prevailing in this case. In contrast, samples that support reliable numerical generalizations must be random. A. 216 (Wilkins). Third, the sample includes irrelevant data (which would further reduce its size if eliminated), i.e. 4 of the juveniles included, Cox (PX 7a), Delgado (PX 19a), Dunaway (PX 21a) and Forde (PX 7a), were detained before the "facts and reasons" requirement for detention under § 320.5(3)(b) became effective on November 24, 1976. *See* pp. 7-8, 12-13. Last, the 34 juvenile case histories were not offered by appellees for generalized numerical comparisons and were not evaluated by their expert statistician or the district court in that light. *See* A. 40-53 (district court review of case histories limited to anecdotal comments); A. 188-89, 193, 195-96 (Wilkins' comments limited to particular case histories; no statistical study offered). *See also* p. 22 n.*, noting that similar, erroneous numerical comparisons offered by the district court (A. 59-61, 64-65) (and eschewed by the majority, A. 102 n.18) relied on different evidence, i.e. PX 38, Tables 81-84, A. 331, R. Doc. 26 and the court's own exhibits, Tables 79-82, R. Doc. 26. Given these facts, the majority's comment that the intervenor conceded the "representativeness" of the case histories (A. 103 n.19) for the numerical comparisons the opinion offers for the first time, is clearly erroneous.

* The majority assigns this dismissal/punishment rationale to one-third of the juvenile case histories. A. 109. According to the exhibits appellees provided (which do not include the transcripts of fact-finding hearings), 11 of the 34 delinquency proceedings were dismissed at fact-finding. Five cases were dismissed because the complaining witness did not appear: Allen (PX 27c, witness afraid); Ancrum (PX 35d); Hanna (PX 4i); Jenkins (PX 4i); and McArthur (PX 6d, dismissed without prejudice). Three cases, Cruz (PX 11c), Lopez (PX 24c, d), and McLaughlin (PX 43d), were adjourned in contemplation of dismissal and dismissed when the juvenile satisfied the terms and conditions of the adjournment. *See* FCA § 315.3 and p. 5 n.*. One case, Parson (PX 18c), was dismissed because the petition was held not to allege a crime, and another, McCain (PX 15c, d), was dismissed because the prosecution did not prove its case beyond a reasonable doubt. Appellees' exhibits show that one case, Ramos (PX 8c), was dismissed but do not include the reason. The exhibits do not provide either the delinquency petition or any information after detention in one case, Maloney (PX 7), and do not provide any information after probable cause was found in another, Rosario (PX 2c).

Exhibits referenced above were received at A. 331 and are included in R. Doc. 26.

Detentions under § 320.5(3)(b) followed by adverse fact-findings and release at disposition on probation or without any 'sentence' are said to be punishment because the decision to detain was mistaken or the decision to release recognized that the juvenile had been punished enough by detention. A. 111-12.*

The alleged constitutionally proscribed result identified by the majority, i.e. more pretrial detentions under FCA § 320.5(3)(b) than post-trial placements, is attributed principally to facial and practical incongruities between § 320.5 (3)(b) and the disposition sections of the Family Court Act. A. 111-12. Section 320.5(3)(b) is said to have only a crime prevention purpose (A.101, 104-105) and to be sub-

* The majority assigns this release at disposition/punishment rationale to one-third of the juvenile case histories. *Compare* A. 103 and A. 111 ('punished' group is allegedly two-thirds of the 34 juveniles) *with* A. 109 (one-third is allegedly 'punished' by dismissals at, or before, fact-finding). According to the exhibits appellees provided (which do not include the transcripts of dispositional hearings), 11 of the 34 juveniles received adverse fact-findings and were "released," as the majority uses the term, all on probation. Seven received 2 years probation: Ascencio (PX 12f); Cox (PX 7c); Forde (PX 7g); Delgado (PX 19d); Martin (PX 1d); Rodriguez (PX 12d); and Santiago (PX 13d). Three received one year probation: Basnight (PX 10c); Gomez (PX 20d); and Melendez (PX 17d). One, Harris (PX 16d), received six months probation. The probations of Cox (PX 7c) and Melendez (PX 17c) were later revoked, and Cox was placed with the state Division for Youth ("DFY") for 12 months (PX 7c, d). Appellees' exhibits do not provide the subsequent disposition for Melendez. The exhibits also do not provide any information about the disposition for Fargas (PX 26) who received an adverse fact-finding.

Ten of the 34 juveniles (including Cox) received adverse fact-findings and were placed with DFY or local commissioners of social services ("CSS"). Two, Dunaway (PX 21d) and Peebles (PX 14d), were placed with DFY for 18 months. Two, Jacobs (Stipulation and Order ¶8, R. Doc. 17) and West (PX 25d), in addition to Cox, were placed with DFY for 12 months. Four were placed with CSS for 18 months: Gregoire (PX 23d); Morgan (PX 3d); Nelson (PX 22d); and Taylor (PX 16g). One, Price (PX 5c), was placed with CSS for 90 days (interim placement, absconded). Under the majority's reasoning, these 10 juveniles were not unconstitutionally punished when they were detained under FCA § 320.5(3)(b) before fact-finding. A.112.

Exhibits referenced above were received at A. 331 and are included in R. Doc. 26.

stantively and procedurally "unlimited" (A. 112, 114) because detention is permitted if a felony or misdemeanor is charged (A. 101), the serious risk of crime standard is set forth without other "criteria" (A. 102) and the "statute itself" does not include procedural safeguards (A. 101-102) although, as the majority observes, related sections do. *See* A. 98-99 (requirements for probable cause hearing and expedited trial noted), A. 104 (rights to counsel, parental notification, statements supporting release and stenographic record noted), A. 113 n.34 (right to petition providing probable cause noted as a matter of practice, now codified in §§ 311.1[3][h], [4], 311.2). Disposition sections, in contrast, are said to consider the best interests of the juvenile (A. 100, 106), to have more elaborate criteria and require more information (A. 100, 106) and to be applied more leniently because the juvenile may receive probation if an appropriate "treatment facility" is not available (A. 100-101, 108) or if he is thought to have spent enough time confined during detention. A. 106-108.* At the conclusion of

* The opinion misreads several provisions of the New York Family Court Act ("the Act") when it compares FCA § 320.5(3)(b) detentions with post-fact-finding dispositions. First, the best interests of the juvenile are not irrelevant under § 320.5(3)(b) and relevant at disposition under § 301.1 as the majority assumes. *See* A. 100 n.13 citing § 711, now § 301.1, and A. 101, 104-106. Section 301.1 states that "the needs and best interests" of the juvenile and "the need for protection of the community" are general purposes of the delinquency article of the Act. Thus, both considerations are involved in all judicial decisions under it. *See* pp. 7-8. (Judge Quinones' testimony on these points [quoted at A. 105 n.24, 106 n.25] is not opposed. *See* p. 7 n.*.) Second, if the § 320.5(3)(b) standard and the disposition standard are to be compared, the comparison is between § 320.5(3)(b) and § 352.1(1) (requiring a finding that the juvenile needs "supervision, treatment or confinement" for a dispositional order), not between § 320.5(3)(b) and § 301.1, the general purposes section. *Contrast* A. 100, 101, 104-106. *See* pp. 13-15. Third, the more elaborate "criteria", e.g. nature of the crime, the opinion suggests are required for disposition and not for § 320.5(3)(b) detention, are applicable by statute when restrictive 3 and 5 year placements for designated felons are considered. *See* A. 100 & n.12 citing § 753-a(2), now § 353.5(2), and p. 14 n.**. Fourth, while more information about the juvenile is available at disposition than at § 320.5(3)(b) detention, the diagnostic assessment the opin-

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its due process analysis, the majority also attributes the alleged proscribed result to conscious judicial choice, stating that Family Court judges "know" and are "well aware" that most of the juveniles they detain under § 320.5(3)(b) will either not go to fact-finding or will be released at disposition. A. 112, 114.*

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ion says is generally provided at disposition (A. 100, 106) is required by statute only when restrictive placements for designated felons are considered. *See* 100 n.7 citing § 750(3), now § 351.1, and p. 13 n.**. Fifth, the opinion draws a distinction between placements for treatment (A. 101, 108) and for incarceration (A. 103, 109, 112) and identifies all placements as restrictive placements at one point. A. 102 n.18. In New York, all placements (except home placements, *see* § 353.3[1]) involve both treatment and confinement in more or less secure environments. *See* p. 14 n.* & n.**. As noted above, restrictive placements are for designated felons and are in the most secure environment for the longest term. *See* § 353.5(4)(a)(ii), (5)(a)(ii) and p. 14 n.**. Delinquents who are not designated felons may also be placed in the most secure environment, but their placements are not characterized as restrictive. *See* § 353.3(3), (9) and p. 14 n.*. Last, while it is true, as the opinion infers from two sources outside the record, that a judge at disposition may find that the particular placement he prefers is not available (A. 100-101 & n.14, 108 & n.30), it is not true that a juvenile who needs a placement is denied one. *See* § 353.3(2), (4). *Contrast* A. 100-101, 108.

* The majority opinion gives limited consideration to the future writ of habeas corpus. A. 115-16. Two propositions, uncontested by intervenor, are noted. First, writs may be brought, in conformity with 28 U.S.C. § 2254, by individuals already "in custody" to challenge their future confinement. Second, writs may be brought on behalf of a class. A. 115. These propositions are then said to allow the instant writ, which, insofar as contested, purports to release class members detained under FCA § 320.5(3)(b) from June 2, 1981, the day after the writ issued, until this case is concluded on appeal. A. 93, 94 (August 5, 1981 clarifying memorandum). The "fact of potential custody" for these juveniles is cited as sufficient to meet the "in custody" requirement of § 2254. A. 115. Intervenor's view that allowing the writ prospective effect erroneously identifies habeas corpus relief with injunctive relief is noted but discounted for two reasons. First, injunctive relief is said to be available against the appellant under 42 U.S.C. § 1983, and the differences between the two remedies are considered immaterial therefor. A. 115, 116 n.36. Second, appropriate relief from the writ's prospective effect is said to be available by application for a stay, relief the Court of Appeals had already denied intervenor and appellant in this case. A. 6 (stay denied on 9/22/81) and p. 23. The Court is referred to the jurisdictional statement for intervenor-appellant, p. 26, here incorporated by reference, for his argument on this point.

The concurring opinion pursues a "traditional due process analysis." A. 117, 118.* The three factor test in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), is cited as providing appropriate guidance. A. 118. Applying the test, the opinion finds a juvenile's interest in pretrial liberty of "fundamental importance." A. 118. It then finds New York's crime prevention interest in FCA § 320.5(3)(b) of "great significance in general" (A. 118) but difficult to realize in particular cases because the likelihood of future crime is uncertain. A. 117, 118-21.** On reaching the third *Mathews* factor, risk of error and value of other procedures, the opinion observes that juveniles detained under § 320.5 (3)(b) receive the "traditional" procedural rights of notice and opportunity to be heard (A. 122 n.8) but finds the statute without "readily available limitations" that would reduce the risk of erroneous detention decisions. A. 121. Five alleged deficiencies are assigned: § 320.5(3)(b) does not particularize crimes charged or pretrial crimes; it does not, in terms, require an assessment of the juvenile's background, e.g. prior 'criminal record'; it does not require an affirmative finding about the likelihood the juvenile committed the crimes charged until the probable cause hearing provided three to six days after detention; and it does not include a standard of proof for the serious risk finding.

* The concurring judge opens his discussion by stating that he is "less certain" than the majority that the record discloses a "significant number" of detentions under FCA § 320.5(3)(b) that are mistakes or punishments. A. 117. The comment is more probing of the majority's analysis and its factual underpinnings (*see* pp. 24 n.**, 25 n.*, 26 n.*) than the stated degree of certitude reveals. The concurring judge expresses doubt about whether any of the detentions in the record, up to a "significant number," are proscribed. The majority finds not just a "significant number" proscribed but the "vast majority." A. 103, 111, 112, 116. The due process analysis it then offers depends on the acceptance of this numerical constraint and facts consistent with it. *See* pp. 24-26.

** The concurring opinion accepts New York's interest in preventive detention under FCA § 320.5(3)(b) as regulatory and constitutionally permissible for purposes of its analysis. A. 117 n.1.

A. 121-22. The opinion then concludes that § 320.5(3)(b) is invalid because it permits juveniles to be detained in the "unbridled discretion" of the Family Court, allegedly in "marked contrast" to adult preventive detention under the District of Columbia statute upheld in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982). A. 122. The requirement that the "facts and reasons" in support of a § 320.5(3)(b) detention order be stated on the record of the juvenile's initial appearance in Family Court is not mentioned in the discussion.

Summary of Argument

Section 320.5(3)(b) of the New York Family Court Act, upheld under the due process clause by the New York State Court of Appeals in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682 (1976), permits a state Family Court judge to detain a juvenile accused of criminal conduct pending trial on a finding that the juvenile presents a "serious risk" of pretrial crime. The detention finding may not issue except in circumstances that conform with, if they do not exceed, those held in *Kent* v. *United States*, 383 U.S. 541 (1966), to provide the process due a juvenile at a critical preadjudicatory stage of a delinquency proceeding. Under the terms of the statute, the detention finding, if warranted, is made at the conclusion of a juvenile's initial appearance before the Family Court and must be based on "facts and reasons" stated on the record of that hearing. The hearing proceeds on a probable cause delinquency petition, alleging specific crimes. The juvenile is represented by counsel, has the right to remain silent, and to challenge the sufficiency of the petition for failure to provide probable cause, among other reasons. He may also contest any information offered in support of his detention, and he may present information on his own behalf. If detained, the juvenile is entitled to an adversary probable cause hearing within a maximum of six days, at which the "facts and reasons" for his detention must again

be assessed as well as probable cause affirmatively found, and to an expedited trial on the crimes charged within seventeen days (except in extraordinary circumstances). The juvenile may also seek review of the detention decision by higher courts and rely on the full record of the detention hearing since it, like other Family Court hearings, is stenographically recorded.

The United States Court of Appeals for the Second Circuit read this statutory scheme as denying fundamental fairness to detained juveniles. According to the majority opinion, too few detained juveniles were later adjudicated on the crimes charged in their delinquency petitions, and too few of those who were adjudicated received long-term placements at disposition. According to the concurring opinion, the serious risk of crime standard did not adequately protect juveniles from the risk of erroneous judicial detention decisions. Both opinions omit consideration of the *Kent* due process standard and the New York statute's express "facts and reasons" requirement. Both also fail to observe that the process provided to detain a juvenile under the statute is sufficient to deny an adult pretrial release on bail. As a result, the opinions provide a juvenile with more due process than an adult receives although a juvenile's and an adult's interests in pretrial liberty are not equivalent.

ARGUMENT

Juveniles accused of crimes may be preventively detained under procedures that satisfy the due process test of fundamental fairness. New York's procedures for detention under Family Court Act § 320.5(3)(b) do so. The detention standard, serious risk of pretrial crime, is definite, and the protections detained juveniles receive, which include a reviewable record of the facts and reasons for detention and an adversary probable cause hearing within six days of detention, assure the procedural regularity of the short-term detention orders the statute permits.

A. Juveniles accused of crimes may be preventively detained for brief periods under fundamentally fair procedures.

The New York Court of Appeals upheld Family Court Act ("FCA") § 320.5(3)(b), then § 739(b), under the due process clause in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y. 2d 682 (1976).* The opinion identifies the brief preventive detention § 320.5(3)(b) permits with the administration of juvenile justice by New York's specialized Family Court (*id.* at 688-89; *see* pp. 2-15) and holds that the statute fairly reconciles "the legitimate interest of youth

* FCA § 320.5(3)(b), originally enacted by L. 1962, c. 686 (*see* p. 8), permits a Family Court judge to detain an accused juvenile delinquent before trial on finding, based on "facts and reasons" stated on the record, that there is a "serious risk" the juvenile will commit a pretrial crime. The "facts and reasons" record consists of a delinquency petition (and supporting depositions, if necessary) that provides probable cause (§§ 311.1[3][h], [4], 311.2) and a stenographic record of the proceedings at initial appearance. *See* pp. 2-4. If ordered, detention under § 320.5(3)(b) is brief. Unless a prosecution witness is disabled as a result of the juvenile's conduct, the presentment agency must proceed to fact-finding, i.e. trial, within a maximum of 17 days from the detention order in A, B and C felonies (except homicides) and a maximum of 6 days in all other cases. § 340.1(1), (3)(a) and pp. 11-12. The juvenile's need for detention is reassessed at the adversary probable cause hearing he is entitled to receive within a maximum of 6 days from the detention order. §§ 325.1(1), (3), 325.3(3) and pp. 12-13.

in their liberty . . . with their entitlement to protection and guidance" and "with the interest of society in its own protection. *Id.* at 691.* The state's interests in § 320.5(3)(b), protecting the community from pretrial juvenile crime and the juvenile from the consequences of criminal behavior, are found "compelling" and incapable of achievement by any means less restrictive than preventive detention. *Id.* at 689.** The juvenile's interest in pretrial liberty is recognized as "fundamental" and entitled to "constitutional" "protection". *Id.* at 686-87. But, as the Court observes, a juvenile's and an adult's interest in pretrial liberty are not the same. "Juveniles are in . . . earlier stages of . . . emotional growth [than adults], . . . their intellectual development is incomplete, . . . they have only limited practical experience, and . . . their value systems have not yet been clearly

* The principle that juveniles are not entitled to consideration of pretrial release on bail had long been established in the United States when *Wayburn* was decided. *Estes* v. *Hopp*, 73 Wash. 2d 263, 438 P.2d 205 (1968); *A.N.E.* v. *State*, 156 So. 2d 525 (Fla. 1963); *State ex rel. Peaks* v. *Allaman*, 51 Ohio Op. 321, 115 N.E.2d 849 (1952); *Cinque* v. *Boyd*, 99 Conn. 70, 121 A. 678 (1923); *Ex parte Sharp*, 15 Idaho 120, 96 P.2d 563 (1908). *See In re Gault*, 387 U.S. 1, 14 (1967); *Kent* v. *United States*, 383 U.S. 541, 555 (1966); *Pee* v. *United States*, 274 F.2d 556, 559 n.14, 563 (D.C. App. 1959). *See also L.O.W.* v. *District Court of Arapahoe*, 623 P.2d 1253, 1258 (Colo. 1981); *Morris* v. *D'Amario*, 416 A.2d 137 (R.I. 1980). Discretionary pretrial release of juveniles on bail was eliminated in New York in 1962 as part of the Legislature's response to the then perceived problem of excessive detention. *People ex rel. Wayburn (Richard L.)* v. *Schupf*, 47 A.D.2d 79 (2d Dept. 1976) (Family Court without power to grant bail). *See* p. 8 & n.**.

** The district court rejected the New York Court of Appeals' finding that New York's interests in FCA § 320.5(3)(b) were compelling (A. 63-66) but found them substantial enough to deny appellees' equal protection claim. A. 63-68. *See* p. 22. The Second Circuit concurrence found New York's interests in § 320.5(3)(b) to be significant in general but capable of erroneous application in particular cases. A. 118-21. *See* pp. 29-30. The Second Circuit majority assumed that preventive detention had to be justified by a compelling state interest in crime prevention and that New York could have that interest in § 320.5(3)(b), but it did not rule on the question because it found that the statute was used principally for punishment of unadjudicated acts, not crime prevention. A. 110-14. *See* pp. 23-24.

identified or firmly adopted." *Id.* at 687. "To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles." *Id.* at 688.* The Court then strikes the constitutional balance in favor of § 320.5(3)(b). *Id.* at 689, 691.**

* Prior decisions of this Court have compared juveniles with adults in substantially identical terms. *Eddings* v. *Oklahoma*, 455 U.S. 104, 115-16 (1982) (death penalty for a 16 year old vacated because all mitigating factors were not considered) (Minority "is a time and condition of life when a person may be most susceptible to influence. . . . . Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature than adults . . . 'often lack[ing] the experience, perspective, and judgment' expected of adults," quoting *Bellotti* v. *Baird*, 443 U.S. 622, 635 [1979], which notes, in addition, that juveniles often lack the judgment "to recognize and avoid choices that could be detrimental to them."); *Ginsberg* v. *New York*, 390 U.S. 629, 649-50 (1968) (*Stewart*, J., concurring) (conviction for selling pornographic materials to minors upheld against First Amendment challenge) ("[A] child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."); *Haley* v. *Ohio*, 332 U.S. 596, 599 (1948) (due process rights of 15 year old violated by police efforts to obtain confession) ("[A] mere child [is] an easy victim of the law. . . . He cannot be judged by the more exacting standards of maturity.").

** In upholding FCA § 320.5(3)(b), the *Wayburn* court notes the fact that New York law then did not (and still does not) have a "matching [preventive detention] counterpart" for adults accused of crimes. 39 N.Y.2d at 689. So far as intervenor's research discloses, only one case, *Blunt* v. *United States*, 322 A.2d 579 (D.C. App. 1974) (upholding District of Columbia statute under due process clause), had ruled directly on the preventive detention of adult citizens when *Wayburn* was decided. The District of Columbia preventive detention statute involved in *Blunt* was again considered and upheld recently in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982) (procedures no more protective of the accused than those involved in detention under § 320.5 [3][b], held sufficient to satisfy the due process rights of adult detainees) (right to pretrial bail under the Eighth Amendment considered and rejected). *See also Hunt* v. *Roth*, 648 F.2d 1148 (8th Cir. 1981), *vac, and remanded as moot sub nom. Murphy* v. *Hunt*, —— U.S. ——, 102 S. Ct. 1181 (1982) (Nebraska constitutional provision prohibiting pretrial bail for accused violent sexual offenders invalidated as foreclosing judicial discretion to release on bail in appropriate cases)

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See Ingraham v. Wright, 430 U.S. 651, 675 (1977) (corporal punishment of minors without prior notice and opportunity to be heard upheld under flexible due process analysis which requires comparison of the particular governmental and private interests involved); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) (same due process analysis applied to adult parole revocation); concurring opinion below, A. 118-19 (same due process analysis applied to case at bar). *See also Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976) (same due process analysis applied to claimed deprivations of protected property interests).

Considerations involved in juvenile detention under FCA § 320.5(3)(b) which are not involved in the adult pretrial detention reinforce *Wayburn's* conclusion (39 N.Y. 2d at 691) that New York's interests in the statute outweigh a juvenile's protected interest in pretrial liberty. First, juveniles, in contrast to adults, are always in some form of

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(right to pretrial bail under Eighth Amendment considered and rejected in *dicta*); *Parker* v. *Roth*, 202 Neb. 850, 278 N.W.2d 106, *cert. denied* 444 U.S. 920 (1979) (same Nebraska constitutional provision involved in *Hunt* upheld) (right to pretrial bail under Sixth, Eighth and Fourteenth Amendments considered and rejected); *Huihui* v. *Shimoda*, 64 Hawaii 527, 644 P.2d 968 (1982) (Hawaii statute prohibiting bail for serious crimes if accused is on bail for a felony invalidated as foreclosing judicial discretion to release on bail in appropriate cases).

If the controversy about adult preventive detention is ultimately resolved against the practice, it will not diminish the force of the New York Court of Appeals' holding in *Wayburn* if it is followed. As this Court has observed, juveniles accused of crimes are entitled to fundamentally fair procedures, but they are not entitled to all the rights of accused adults. "There is no automatic congruence between the procedural requirements imposed by due process in a criminal case and those imposed in juvenile cases." *In re Winship*, 397 U.S. 358, 374 (1970) (*Harlan*, J., concurring). *Accord*, *Breed* v. *Jones*, 421 U.S. 519, 533-34 (1975); *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 545 (1971); *In re Gault*, 387 U.S. 1, 22-24 (1966); *Kent* v. *United States*, 383 U.S. 541, 556-57 (1966). Indeed, the Court's decisions recognize that even preferred freedoms may be invaded when, as here, concerns about the ability of juveniles to make self-restrained, mature choices are in issue. *Ginsberg* v. *New York*, *supra* (conviction for selling pornographic literature to minor upheld when First Amendment would have invalidated conviction if sale were to an adult); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (conviction for supplying religious literature to minors to sell on the streets upheld).

custody whether at home, at school or in detention under § 320.5(3)(b).* *In re Gault*, 387 U.S. 1, 17 (1967); *Morris* v. *D'Amario*, 416 A.2d 137, 140 (R.I. 1980); *Baker* v. *Smith*, 477 S.W.2d 149, 151 (Ky. 1971); *Pauley* v. *Gross*, 1 Kan. App. 2d 736, 574 P.2d 234, 240 (1977); *Ex parte Sharp*, 15 Idaho 120, 96 P.2d 563, 564 (1908); *Petition of Ferrier*, 103 Ill. 367, 371-73, 42 A.R. 10 (1882); *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839). *See also* testimony of Hon. Margaret Driscoll, A. 325, 327. Second, juvenile detention under § 320.5(3)(b), in contrast to adult pretrial detention, may be either secure or nonsecure. *See* pp. 10-11. The least restrictive environment for the juvenile must be preferred, and the choice is made initially, and monitored during detention, by specialized detention agency personnel who interview the juvenile and review his social history. *See* pp. 10-11 and *Secretary of Public Welfare* v. *Institutionalized Juveniles*, 442 U.S. 640, 648-50 (1979) (mentally disabled juveniles' interest in liberty upon institutionalization satisfied by nonadversarial inquiry, decision and periodic review by mental health professionals); *Parham* v. *J.R.*, 442 U.S. 584, 606-607 (1979) (same). Third, juveniles are more likely to recidivate than adults. *In re Gault*, 387 U.S. at 21-22; *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y. 2d at 688, 689, 690-91.** As a consequence, New York's interest in preventively detaining them is greater than in comparable authority for adults, and the juvenile's opposing interest in pretrial liberty is not as weighty as an

* Intervenor does not suggest that a juvenile's 'in custody' status places his interest in pretrial liberty outside the protection of the Fourteenth Amendment. *See* FCA § 301.1; *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y. 2d at 686-87, and pp. 2-13. *Contrast In re Gault*, 387 U.S. at 16-31. However, the juvenile's status in this regard shows that his transfer from the custody of his parents to the custody of a local detention agency under FCA § 320.5(3)(b) involves only questions of degree, not of kind.

** According to the testimony of appellees' expert in criminology and statistics, the peak period for recidivism after arrest is 3 to 6 months. A. 200-202 (Wilkins). *See* pp. 20-21. The period corresponds with the time a juvenile can be on release before fact-finding, i.e. 90 days at the time of the trial below, now 120 days, if not detained under FCA § 320.5(3)(a) or § 320.5(3)(b) (substantial probability of nonappearance). *See* pp. 8 n.*, 11 n.**.

adult's would be. Last, juveniles are detained under § 320.5(3)(b) for less time than adults are detained before trial. The presentment agency is allowed no more than seventeen days between detention and fact-finding (unless a homicide is charged or a witness is disabled) and must usually proceed in six days. FCA § 340.1(1), (3)(a). *See* p. 32 n.*. In New York, prosecutors of adult pretrial detainees are allowed ninety days from detention in felonies, thirty days in misdemeanors punishable by more than three months and fifteen days in misdemeanors punishable by up to three months. New York Criminal Procedure Law ("CPL") § 30.30(2). In the District of Columbia, prosecutors of preventively detained adults are allowed ninety days from detention. D.C. Code 1981, § 23-1322(d)(2), (4) (statute allowed sixty days when upheld in *United States* v. *Edwards*, 430 A.2d 1321, 1331 n.27 [D.C. App. 1981] [en banc], *cert. denied* 455 U.S. 1022 [1982]).

Every state and the United States permit preventive detention of juveniles accused of crimes. Although the laws of the several jurisdictions vary in their terms, they support, if they do not compel, the conclusion that the effect of FCA § 320.5(3)(b) on a juvenile's interest in pretrial liberty does not offend "some principle of justice . . . rooted in the traditions and the conscience of our people." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). *See McKeiver* v. *Pennsylvania*, 403 U.S. 528, 548-49 (1971).* The highest

* Seven states have preventive detention statutes like FCA § 320.5(3)(b) which look to the juvenile's risk of a pretrial crime or a non-criminal offense (conduct not included by § 320.5[3][b]). Ala. Code § 12-15-59 (1982) (clear and substantial threat)*; Conn. Gen. Stat. Ann. § 46b-131(1) (1982 Supp.) (strong probability); Iowa Code Ann. § 232.22(d) (1981 Supp.) (serious risk); La. Code Juv. Proc. Art. 40 (1979) (serious risk); Ariz. Rev. Stats. § 17A (1981-82) (likely); Idaho Code § 16-1811 (1982 Supp.) (likely); Ky. Rev. Stats. § 208.192(4)(c) (1982) (possible).

Eleven states have preventive detention statutes which qualify the pretrial crime or act. Kan. Stat. Ann. § 38-815(b) (1981 Supp.) (dangerous act to self or others); Mich. Comp. Laws Ann. § 712A.15 (1982-83 Supp.) (serious offense); N.H. Rev. Stat. Ann. § 169B:14 (1981 Supp.) (serious bodily harm); N.J. Stat. Ann. § 2A:4-56

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courts of at least six states, in addition to the New York Court of Appeals, have upheld their statutes with specific reference to protecting the juvenile and the community from harmful pretrial conduct, necessarily including pretrial crime. *L.O.W.* v. *District Court of Arapahoe*, 623 P.2d 1253, 1258-59 (Colo. 1981) (detention to protect the juvenile

(1982 Supp.) (serious threat to others); N.C. Gen. Stat. § 7A-574 (1981) (serious injury to others); Tex. Fam. Code Ann. § 53-02 (1982-83 Supp.) (dangerous act)*; Va. Code Ann. § 16.1-248 (1982) (unreasonably dangerous act); Wash. Rev. Code Ann. § 13.40.040 (1982 Supp.) (dangerous act). Three of these jurisdictions qualify both the risk of pretrial crime and the pretrial crime itself. Ala. Code § 12-15-59 (1982) (clear and substantial threat of an act of a serious nature)*; Iowa Code Ann. § 232.22(3) (1981 Supp.) (serious risk of a crime causing serious bodily harm to others); Ky. Rev. Stats. § 208.192(4)(c) (1982) (possible risk of a dangerous act).

Eleven states and the United States have statutes which permit pretrial detention to protect the community and others from the juvenile, necessarily including pretrial crime. Alas. Stat. § 47.10.140 (1982); Col. Rev. Stat. Ann. § 19-2-102 (1981 Cum. Supp.); Conn. Gen. Stats. § 46b-131 (1982); Hawaii Rev. Stat. § 571-31 (1981 Supp.)*; Ind. Ann. Stat. § 31-6-4-5 (1980); Ky. Rev. Stat. § 208.192 (1982); Minn. Stat. Ann. § 260.171 (1982); N.J. Stat. Ann. § 2A:4-56 (1982 Supp.); Or. Rev. Stat. § 419.573 (1981); S.D. Code § 26-8-19.2 (1982 Supp.)*; Tex. Fam. Code Ann. § 53.02 (1982-83 Supp.)*; 18 U.S.C. § 5304*.

Eleven states have statutes which permit pretrial detention to protect the juvenile, his property or the property of others, necessarily including pretrial crime. Cal. Welf. & Inst. Code § 628 (1982); Ga. Code Ann. § 24A-1401 (1982)*; Ill. Rev. Stat. ch. 37, § 703-4 (1982-83 Supp.); Iowa Code Ann. § 232.22 (1981 Supp.); Md. Ann. Code § 3-815(b) & (c) (1982 Supp.); Mont. Code Ann. § 41-5-305(a) (1981); Nev. Rev. Stat. § 62.140 (1981); N.D. Cent. Code §27-20-14 (1981 Supp.); Ohio Rev. Code Ann. tit. 21, ch. 2151(D) (1980)*; Pa. Stat. Ann. § 6325 (1978 Supp.); Va. Code Ann. § 16.1-248 (1982); Wisc. Stat. Ann. § 348.208 (1982-83 Supp.).

Twenty-one states and the District of Columbia have statutes or court rules permitting pretrial detention in the best interests of the juvenile or to protect him, necessarily including pretrial crime. Ala. Code § 12-15-59 (1979)*; Ariz. R. Proc. Juv. Cts. 3(b)(4) (1978); Ark. Stat. Ann. § 45-421(f) (1978); Dela. Fam. Ct. Rule 60 (1980); D.C. Code § 16-2310 (1981); Fla. Stat. Ann. § 39.032(d) (1981); Idaho Code § 16-1811 (1982 Supp.); Kan. Stat. Ann. § 38-16-32(e) (1981 Supp.); Me. Rev. Stat. Ann. tit.

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and the community from serious bodily harm); *Morris* v. *D'Amario*, 416 A.2d at 142 (detention to protect the juvenile and the community); *State* v. *Gleason*, 404 A.2d 573, 583 (Me. 1979) (detention to prevent future harmful acts); *Pauley* v. *Gross*, 574 P.2d at 237 (detention of juvenile dangerous to self or others); *Aubrey* v. *Gadbois*, 50 Cal. App. 3d 470, 123 Cal. Rptr. 365, 366 (1975) (detention to protect the juvenile and the person or property of others); *Baker* v. *Smith*, 477 S.W. 2d at 150, 151 (detention to protect the juvenile from danger).

Since, as just demonstrated, a juvenile's interest in pretrial liberty does not foreclose his preventive detention, all this Court need find to follow the New York Court of Appeals in upholding FCA § 320.5(3)(b) is that juveniles detained under the statute receive the process that is due. *See Ingraham* v. *Wright*, 430 U.S. at 672, 674 (procedures that constitute due process considered after comparison of particular governmental and private interests); *Morrissey* v. *Brewer*, 408 U.S. at 481 (same). The appropriate test

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15, § 3203(4)(c)(5) (1982-83 Supp.); Miss. Code Ann. §43-23-11 (1981)*; Mo. R. Juv. Ct. 111.02 (1982); N.H. Rev. Stat. Ann. 169B:14 (1981); N.M. Stat. Ann. § 32-1-24 (1982 Supp.); N.C. Gen. Stat. § 7A-574(b)(8) (1981); S.C. Code Ann. §20-70-600 (1981 Supp.); Tenn. Code Ann. § 37-214 (1982 Supp.); Utah Code Ann. § 78-3a-30 (1981 Supp.); Vt. Stat. Ann. tit. 31, § 643 (1981); Va. Code Ann. § 16.1-248 (1982); Wash. Rev. Code Ann. § 13.40.040 (1982 Supp.); W. Va. Code Ann. § 49-5-8(d) (1982 Supp.); Wyo. Stat. Ann. § 14-6-206(i) (1980).

Four states have statutes permitting detention in the discretion of the court, necessarily including pretrial crime. Mass. Ann. Laws ch. 19, § 66 (1982); Neb. Rev. Stats. § 43-255 (1982 Supp.); Okla. Stat. Ann. ch. 10, § 1107 (1981-82 Supp.)*; R.I. Gen. Laws §§ 14-1-20, 21 (1981).

All states and the United States appear to permit detention on a finding that the juvenile is not likely to appear in court for fact-finding. *See, e.g.*, FCA § 320.5(3)(a). Nonappearance is not codified in Hawaii,* Massachusetts, Nebraska and Rhode Island.

Intervenor's office surveyed the federal and state jurisdictions referenced above by mail. Forty-four jurisdictions answered the survey, and the references to their statutes are taken from the materials they provided. References for jurisdictions that did not answer, indicated by asterisks, were obtained from the latest state and federal codes locally available.

is fundamental fairness to the juvenile, and it is satisfied.* The § 320.5(3)(b) detention standard is definite, and the juvenile has opportunities to be heard that provide reasonable safeguards against error and are sufficient to support the pretrial restraint of adults for longer periods. *See Ingraham* v. *Wright*, 430 U.S. at 674-75, 678-82 (risk of error and value of other procedures to be considered in deciding what process is due); *Mathews* v. *Eldridge*, 424 U.S. at 335, 343-47 (same); *McKeiver* v. *Pennsylvania*, 403 U.S. at 547-48 (same); concurring opinion below, A. 118, 119, 121-22 (risk of error and value of other procedures considered in case at bar).

B. The procedures for detaining juveniles accused of crimes under New York Family Court Act § 320.5 (3)(b) are fundamentally fair.

When the New York Court of Appeals upheld FCA § 320.5(3)(b) in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682, 690 (1976), it observed that the statute did not "ineluctably involve[] an unconstitutional element of vagueness and speculation" because it required a Family Court judge to evaluate the likelihood of a juvenile's pretrial criminal behavior. This Court has made the same observation about evaluations of the likelihood of crime that are involved in virtually every criminal justice decision, from the imposition of the death penalty to pretrial bail. *Jurek* v. *Texas*, 428 U.S. 262, 274-76 (1976) (opinion of *Stewart, Powell* and *Stevens*, JJ.) (death penalty, bail, sentencing and parole referenced); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 9-10, 16 (1979) (parole release); *Morrissey* v. *Brewer*, 408 U.S. 471, 480

* This Court has applied a due process test of fundamental fairness in all its prior juvenile justice decisions. *Breed* v. *Jones*, 421 U.S. 519, 530-31 (1975); *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 543 (1971); *In re Gault*, 387 U.S. 1, 12-31 (1967); *Kent* v. *United States*, 383 U.S. 541, 553 (1961). *See Gallegos* v. *Colorado*, 370 U.S. 49, 50-55 (1962); *Haley* v. *Ohio*, 332 U.S. 596, 599-601 (1948).

(1972) (parole revocation); *Rehman* v. *State of California*, 85 S. Ct. 8 (1964) (*Douglas* as Cir. J.) (denial of bail pending appeal); *Fernandez* v. *United States*, 81 S. Ct. 642, 644 (1961) (*Harlan* as Cir. J.) (revocation of pretrial bail).

In contrast, the "traditional due process analysis" (A. 117, 118) offered by the concurring opinion below fastens on the evaluation of the likelihood of crime that FCA § 320.5(3)(b) requires as the reason the statute denies juveniles the process that is due. A. 119-22. The statute is said to fail the risk of error analysis in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), because it is without five "readily available limitations" that, if present, would reduce the risk of erroneous judicial detention decisions while reasonably accommodating the state's crime prevention interests. A. 120-21. Accordingly, FCA § 320.5(3)(b) is said to pose an unnecessary risk to a juvenile's protected interest in pretrial liberty. A. 118, 120. The five "readily available limitations" (A. 121) are: particularized predicate crimes; particularized pretrial crimes; 'criteria', e.g. prior crimes, home environment; a standard of proof for the statute's serious risk of crime finding; and a finding at detention of probable cause or of some lesser degree of likelihood that the predicate crime was committed. A. 121-22.*

On examination, the first two limitations assigned by the concurring opinion, particularized predicate and pretrial crimes, are shown to be without constitutional significance, to oppose New York's crime prevention interests in FCA § 320.5(3)(b) and not to improve on judicial decisions under the statute's "all crime" standard; the third limitation, 'criteria', is also shown to be without constitutional

* The majority opinion below relies on the absence of particularized predicate crimes and "criteria" to support its characterization of FCA § 320.5(3)(b) as "unlimited." A. 101-102, 112, 114. The majority also observes an absence of procedural safeguards for the statute but does not elaborate other than to suggest, at odds with the concurrence, that probable cause provided by the delinquency petition (and supporting depositions) and found after adversary hearing (*see* pp. 3 n.*, 11-12) may not be sufficient to support pretrial detention. A. 113 n.34.

significance and not to improve on the statute's "facts and reasons" requirement; and the last two limitations, standard of proof and probable cause, while of constitutional interest, are necessarily resolved in intervenor's favor by the fact that the same procedures used for detention under FCA § 320.5(3)(b) are used to support more extended and severe restraints of adult pretrial liberty. Accordingly, none of the 'absent' limitations the concurring opinion assigns to § 320.5(3)(b) in its *Mathews* analysis serves to invalidate the statute.

New York's significant interest in preventing all juvenile pretrial crime, accepted by the concurring opinion, for purposes of its analysis, as the predicate for constitutionally permissible preventive detention in the first instance (A. 117 n.1), and the "all crime" preventive detention standard in FCA § 320.5(3)(b) are in perfect congruence. The particularized crime standard offered by the concurring opinion (A. 121-22) is inconsistent with the state's "all crime" interest and thus more vulnerable to constitutional attack than FCA § 320.5(3)(b). It also substantially disables the state "function" involved in § 320.5(3)(b) and has no "probable value" since it enhances, rather than diminishes, the risk that a juvenile's pretrial liberty will be erroneously deprived. *Mathews* v. *Eldridge*, 424 U.S. at 335. The last two propositions find direct support in the evidentiary record of this case.

First, the expert witnesses at the trial below who spoke to the point, Judge Quinones, Judge Driscoll and Deputy Commissioner Kelly for intervenor and Dr. Zinn for appellees, agreed that there are certain juveniles who will commit repeated crimes absent societal intervention. A. 244, 250-51, 307, 311-12, 316, 325 and pp. 9 n.*, 21. Judge Quinones further testified that some of these juveniles routinely will appear in court, i.e. they are not detainable under New York's alternative detention provision, FCA § 320.5(3)(b) (substantial probability of nonappearance). A. 250-51. Accordingly, absent bail for juveniles, an option not available in New York (*see* p. 8 n.**) and not well-advised (A. 316-17 [Driscoll]), the adoption of a particularized crime standard does not reasonably accommo-

date New York's crime prevention interests in FCA § 320.5 (3)(b). Indeed, it opposes them since both the juvenile and community are left vulnerable to criminal behavior from which § 320.5(3)(b) would provide greater protection.

Second, as the testimony of Leslie T. Wilkins, an expert statistician called by appellees, establishes, the risk of error in "predicting" future crimes does not diminish with particularization, it increases. A. 199, 202. *See also* A. 72-80 (extended district court discussion on risk of error in predicting dangerous and violent crimes). Accordingly, the particularized crime standard that the concurring opinion says will reduce erroneous judicial detention decisions, in fact, will likely increase them and will result in more erroneous deprivations of juvenile pretrial liberty than the opinion assigns to FCA § 320.5(3)(b).

Last, the concurring opinion's statement that the lists of crimes in the District of Columbia preventive detention statute upheld in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1202 (1982), permits that statute to be characterized as "[i]n marked contrast" to FCA § 320.5(3)(b) (A. 122) is untrue. Reference to the extensive lists of dangerous crimes and crimes of violence for which the District of Columbia statute permits detention (*Edwards*, 430 A.2d at 1324 n.46) and to the 'lists' of crimes for which the juveniles in the thirty-four case histories in evidence were detained (*see* pp. 16 n.**, 18 n.*) show that the crimes on both lists are virtually identical.

The absence of 'criteria' from FCA § 320.5(3)(b) elaborating the serious risk of crime standard is not a source of constitutional infirmity in the statute, nor would the presence of 'criteria' assure improved detention decisions. *Contrast* majority opinion, A. 102, concurring opinion, A. 121. *Kent* v. *United States*, 383 U.S. 541 (1966), is dispositive on both points. *Kent* held that a youth at a "critically important" stage of a delinquency proceeding, transfer from the District of Columbia Juvenile Court, where the maximum penalty for his crime was five years, to an adult criminal court, where the maximum penalty was

death, had been denied fundamental fairness when the transfer order, which the youth had opposed, omitted findings or reasons for the Juvenile Court's action. 383 U.S. at 546, 556, 557. Included in the *Kent* record were the transfer 'criteria' in effect when the Juvenile Court had issued its invalid order (383 U.S. at 565-68) and an indication that they had been rescinded. *Id.* at 546 n.4. On these facts, this Court defined the process due a juvenile at a "critical" preadjudicatory stage of a delinquency proceeding to consist of a hearing with effective assistance of counsel and a "*statement of the reasons*" for the court's action (383 U.S. at 557. Emphasis added.), a requirement identical with the "facts and reasons" requirement § 320.5 (3)(b) incorporates. The Court did not refer to the Juvenile Court 'criteria' as an aspect of the process due, evidently recognizing the elaboration of reasons for decision on the record of a particular case as the only relevant due process concern. Only that elaboration, not the presence or absence of collateral material, protects the accused from "unbridled" judicial discretion by providing him with a reviewable record.

Indeed, bail 'criteria,' analogous in substance and purpose to the detention 'criteria' the majority (A. 102) and concurring (A. 121) opinions find constitutionally required for FCA § 320.5(3)(b), have been specifically recognized as precatory in New York and, perforce, without any constitutional dimension. *See* Practice Commentary to Criminal Procedure Law § 510.30, McKinney's Consolidated Laws of New York, Book 11A, at 16, identifying both New York's bail 'criteria,' i.e. § 510.30(2)(a), added by L. 1970, c. 996, § 1, eff. Sept. 1, 1971, and their source, the federal bail 'criteria,' 18 U.S.C. § 3146(b), as precatory. Notably, the areas for judicial consideration at the pretrial bail stage of a criminal case or the preventive detention stage of a delinquency proceeding are the same, whether written and identified as 'criteria' or whether spoken by individual judges and identified and commonly applied as 'considerations.' *Compare* CPL § 510.30(2)(a)(i) ("prior criminal record," 'criterion' for pretrial bail) and District of Colum-

bia Juvenile Court transfer 'criterion' ¶ 7 (*Kent* v. *United States*, 383 U.S. at 567) ("record and . . . previous contacts") *with* Judge Quinones (A. 263, 267) ('consideration' of "past record" on preventive detention in New York) and Judge Driscoll (A. 319) ('consideration' of "record of prior delinquent conduct" on preventive detention in Connecticut).

FCA § 320.5(3)(b) refers the finding of serious risk of pretrial crime to the circumscribed discretion of the Family Court judge presiding at the juvenile's initial appearance. Applying the statute's terms, the judge must conclude that its preference for release is overcome, make an affirmative "finding" that the juvenile presents a "serious risk" of pretrial crime, and support his finding by "facts and reasons" stated on the record. *See* pp. 7-8. The last statutory requirement, "facts and reasons" stated on the record, satisfies the *Kent* test of fundamental fairness at a critical preadjudicatory stage of a delinquency proceeding. 383 U.S. at 557. However, as the concurring opinion observes in assigning its penultimate deficiency to FCA § 320.5(3)(b), the statute does not include a "burden of proof" that qualifies the serious risk finding beyond the constraints it imposes on judicial discretion. A. 122.

The District of Columbia preventive detention statute (D.C. Code 1981 § 23-1321[a]), upheld in *United States* v. *Edwards*, *supra*, the New York bail statute (CPL § 510.30), and the federal bail statute (18 U.S.C. § 3146) also do not impose burdens of proof on the specifically discretionary evaluations of likelihood of pretrial crime and nonappearance they require. They do, however, impose far more severe and extended restraints on individual liberty than does § 320.5(3)(b). As noted earlier (p. 37), in the District of Columbia, preventively detained adults may be held for ninety days before trial, and in New York, adults who cannot post, or were denied bail, may be held for fifteen to ninety days depending on the potential sentence for the crime charged. All are held in jail. In contrast, juveniles detained under § 320.5(3)(b) may be held for a maximum

of seventeen days (except in extraordinary circumstances *see* pp. 32n.*, 37), and they are held either securely or non-securely under the care of a specialized juvenile agency (*see* pp. 10-11), not in jail.

Notwithstanding the brief and less intrusive nature of juvenile preventive detention in relation to adult pretrial detention, juveniles receive no less procedural rights at initial appearance than adults receive at arraignment where bail is determined. *See* pp. 2-13. Accordingly, were this Court now to add a specific burden of proof to FCA § 320.5(3)(b), juveniles would acquire greater procedural rights than adults although their claim to due process protection is less compelling.

The concurring opinion's last assigned deficiency in FCA § 320.5(3)(b), the absence of a finding at detention of probable cause or of some lesser degree of likelihood that predicate crime was committed, fails for the same reason as its burden of proof contention. The Family Court Act requirements for a probable cause petition at initial appearance, which the juvenile may thereupon challenge for insufficiency, and an adversary probable cause hearing within six days of detention parallel adult rights. *See* pp. 3 n.*, 4 n.*, 5, 11-12. In addition, they substantially exceed the constitutional standard established in *Gerstein* v. *Pugh*, 420 U.S. 103, 114, 120-26 (1975), which permits a similar period of restraint without adversary hearing. *See United States* v. *Edwards*, 439 A.2d at 1335-37 (preventive detainee held six days before probable cause found under *Gerstein*).

C. New York Family Court Act § 320.5(3)(b) does not punish juveniles accused of crimes without trial.

The due process analysis offered by the majority opinion to invalidate FCA § 320.5(3)(b) (reviewed in detail, pp. 23-28) is flawed throughout and must be rejected. The opinion's threshold premise (A. 109) that pretrial detention places the presumption of innocence at risk has been rejected repeatedly. *Bell* v. *Wolfish*, 411 U.S. 520, 532-33 (1979); *United States* v. *Edwards*, 430 A.2d 1321, 1331-33 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022

(1982); *Sistruck* v. *Lyons*, 646 F.2d 64, 71 (3d Cir. 1981); *Blunt* v. *United States*, 322 A.2d 579, 584 (D.C. App. 1974). The supposed 'matching' comparisons the opinion adopts (A. 111-13) in a search for congruence between detentions under § 320.5(3)(b) and post-trial placements wrongly assume that due process requires different procedural stages in a delinquency proceeding, e.g. detention based on probable cause and fact-finding based on proof beyond a reasonable doubt, to yield equally adverse results, *contrast Baker* v. *McCollan*, 443 U.S. 137, 142-46 (1979), that dispositions of probation for up to three years are 'releases,' inconsistent with nonsecure or secure placements of one year to eighteen months and/or restrictive placements of three to five years (*see* p. 14 n.* & n.**), *contrast Rinaldi* v. *Yeager*, 384 U.S. 305, 309-310 (1966), and that pre-fact-finding detention for up to seventeen days (except in extraordinary circumstances, *see* pp. 32 n.*, 37) is comparable to placement, whether for eighteen months or five years, in the first instance.

The comparisons, in turn, depend on a retroactively applied numerical 'majority' constraint which disregards the "facts and reasons" for detention under FCA § 320.5(3)(b) and the "facts and reasons" for 'release' at disposition in particular cases (*see* pp. 16 n.**, 18 n.*, summarizing "facts and reasons" for detention under § 320.5[3][b] in the thirty-four juvenile case histories appellees provided, and p. 26 n.*, noting dispositional outcomes in twenty, including eleven 'releases' on probation, but without "facts and reasons" because they were not provided) and which does not permit the constitutional validity of any detention under § 320.5(3)(b) to be assessed until the ultimate disposition of the case is known and the year-end statistics for the Family Court have been reported.

In addition, the comparisons are without evidentiary foundation in the record. A. 102 n.18. The Vera Study does not provide any information about detentions under § 320.5(3)(b) as distinguished from § 320.5(3)(a) (substantial probability of nonappearance), and the thirty-four juvenile case histories are not a random sample from which generalizations about all New York juvenile delinquency

proceedings can be drawn. *See* p. 24 n.**. Indeed, the same analytically and factually flawed comparisons were rejected by the New York Court of Appeals in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682, 690 (1976), when it upheld § 320.5(3)(b), then § 739(b), under the due process clause.

Conclusion

For the foregoing reasons, the judgment below should be reversed and New York Family Court Act § 320.5(3)(b) declared constitutional under the due process clause.

Dated: New York, New York
August 15, 1983

(reprinted August 31, 1983)

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* The Attorney General gratefully acknowledges the assistance of Carol Bombardi, Andrea Shapiro and Ilana Gruebel, Summer Law Clerks, in the preparation of this brief.

Nos. 82-1248, 82-1278

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

—v.—

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly stated.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Nos. 82-1248, 82-1278

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant

v.

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly stated.

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is a class action writ of

habeas corpus, pursuant to 28 U.S.C. § 2241 et seq., which challenges as unconstitutional the provision of the New York Family Court Act authorizing pretrial detention of alleged juvenile delinquents whenever "there is a serious risk that [the juveniles] may before the return date commit an act which if committed by an adult would constitute a crime." Family Court Act (hereinafter "F.C.A.") § 320.5(3)(b)[formerly § 739 (a)(ii)].

After a full trial on the merits, the United States District Court, Southern District of New York, declared the statute unconstitutional. United States ex rel. Martin v. Strasburg, 513 F.Supp. 691 (S.D.N.Y. 1981)(J.A. 36-92).[1] The

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[1]Citations to pages in the Joint Appendix filed on this appeal are indicated by "J.A. __". Citations to portions of the trial transcript included in the record before this Court, but not in the Joint Appendix, are indicated by "T.

District Court findings and conclusions were unanimously affirmed by the Second Circuit. Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982)(J.A. 95-123). Thus, the case is before the Court on affirmed findings of fact, with no factual issues presented to the Court for review.[2]

A. Proceedings in the Courts Below

A petition for a class action writ of habeas corpus and declaratory judgment was filed in the United States District Court, Southern District of New York, on December 21, 1977, and refiled in amended form with additional named

(footnote continued)

__". Exhibits presented by appellees and intervenor-appellant, listed at J.A. 332-341 and contained in Document 26 of the record on appeal, are cited by petitioners' exhibit number ("PX __") and intervenor-appellant's exhibit number ("SX ___"), respectively.

[2]Petitioners-appellees (hereinafter "appellees") adopt the summary of juvenile delinquency procedures under Article III of the New York Family Court Act as set forth in the Brief of Appellant Schall, at 9-16, except as noted herein.

petitioners on March 31, 1978. (J.A. 1, 8-15). On April 3, 1978, the district court certified the proceeding as a class action, defining the class as:

> all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) [now § 320.5(3)(b)] of the [Family Court] Act.

(J.A. 32). The court further held that appellees had sufficiently exhausted state remedies, as required by 28 U.S.C. § 2254(b), in that in 1976 the New York Court of Appeals had upheld the constitutionality of the pretrial detention statute against a challenge identical to that presented in the instant case. People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 385 N.Y.S.2d 518 (1976)(J.A. 29).[3]

---

[3]Appeal to this Court from Wayburn was unavailable because the case was moot. See Murphy v. Hunt, 455 U.S. 478 (1982)(per curiam). Because the detainee in Wayburn was past the age of 16

A bench trial was held at which appellees presented testimony of an attorney experienced in juvenile delinquency cases (Steven Hiltz),[4] a supervising probation officer in the Bronx County Family Court (Hubert Benjamin)[5] and experts in criminological statistics

(footnote continued)

by the time of the decision, the issue was not capable of repetiton as to him. Weinstein v. Bradford, 423 U.S. 147 (1975). Indeed, the issue was moot, for Article III purposes, by the time the New York Court of Appeals decided Wayburn. That court reached the merits purely as a matter of discretion because of the importance of the issue without implicating a view of Article III. See DeFunis v. Odegaard, 416 U.S. 312,316(1974)(per curiam).

[4]Steven Hiltz was an attorney in the Juvenile Rights Division of The Legal Aid Society for 8 1/2 years and was the attorney-in-charge of its Manhattan office from 1976-1979. (J.A. 127-128).

[5]Hubert Benjamin has been a supervising probation officer in the Bronx Family Court since 1968. He had been a probation officer for thirty years at the time of trial. (J.A. 141).

(Leslie T. Wilkins)[6] and child psychiatrist (L. David Zinn).[7] Additionally, appellees presented testimony of three juveniles and an illustrative sampling of family court histories of juveniles detained pursuant to former F.C.A. § 739(a)(ii),

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[6]Leslie Wilkins, professor of Criminal Justice at the State University of New York at Albany since 1969, was a former dean of the School of Criminology of the University of California at Berkeley. As a statistician certified by the Royal Statistical Society in Great Britain, he has received honors, has held editorial positions on professional journals, has done consulting for, inter alia, the United States Department of Justice and has published numerous books addressing issues of criminology, detention and sentencing. See, e.g., Wilkins, Evaluation of Penal Measures (1969). (J.A. 184-188; PX 40).

[7]Dr. Zinn, who is Board-certified in general and child psychiatry, is the Director of Child Psychiatry at Michael Reese Hospital in Chicago and Clinical Assistant Professor at the University of Chicago. In addition to numerous publications and professional affiliations, Dr. Zinn served as a consultant, inter alia, to the Washtenaw County (Michigan) Juvenile Court, the New York State Council on Children and Families and the Juvenile Justice Institute. (J.A. 227-230; PX 41).

thirty-four of which were relied upon by the district court, as well as relevant reports and statistical compilations. See J.A. 332-338; PX 1-44.

Intervenor-appellant offered the testimony of Ralph Kelly, then Deputy Commissioner of the New York City Department of Juvenile Justice ("D.J.J."), Michael Bigley, then director of the Detention Services Section of the New York State Division for Youth ("D.F.Y."), Hon. Cesar Quinones, a judge of the New York State Family Court, and Hon. Margaret Driscoll, a judge of the Connecticut Superior Court. Intervenor-appellant also put into evidence various documents concerning detention procedures in New York and Connecticut, as well as additional statistics. See J.A. 339-341; SX A-T. The Commissioner of the Department of Juvenile Justice participated neither in the trial nor

the appeal of the case to the United States Court of Appeals, Second Circuit.

On April 17, 1981, the district court issued its opinion declaring New York's juvenile preventive detention scheme unconstitutional as a violation of the Fourteenth Amendment. The court held the statute violative of due process because:

> (1) it gives the judge a license to act arbitrarily and capriciously in a [F.C.A.] § 739 [(a)(ii)] prediction of the likelihood of future criminal conduct which cannot result from a reasoned determination, (2) pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process, and (3) in addition, constitutes punishment that is constitutionally impermissible under the due process clause.

(J.A. 69).

The court entered judgment in an order on June 1, 1981, which declared F.C.A. § 739(a)(ii) unconstitutional and directed release forthwith of all

class members in custody pursuant to that statute. (J.A. 93).[8] An application made by intervenor-appellant for a stay of the court's June 1, 1981 order pending appeal was denied by the Second Circuit, on September 22, 1981. (J.A. 6).

On appeal, the Second Circuit unanimously affirmed the findings of the district court. Judge Winter, in a careful opinion "strictly limited to the precise issue" before the court, held

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[8]In a clarifying memorandum to all counsel, dated August 5, 1981, the court stated that the writ required release of all juveniles held by appellant "under the relevant act until this proceeding is concluded or the judgment entered is reversed." (J.A. 94). Intervenor-appellant continues to challenge the propriety of the court's release order, which was affirmed by the Court of Appeals (J.A. 115-116), notwithstanding the clear holdings of this Court in Preiser v. Rodriguez, 411 U.S. 475, 487 (1973), Braden v. Judicial Circuit Court of Kentucky, 410 U.S. 484, 489 (1973) and Peyton v. Rowe, 391 U.S. 54 (1968). However, this issue is not properly before the Court on this appeal. 28 U.S.C. § 1254(2).

> only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively and procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt.

(J.A. 114). The panel expressly "intimate[d] no view as to the constitutionality of preventive detention in other circumstances." Id.

The panel found, based on undisputed evidence, that

> the vast majority of juveniles considered sufficiently dangerous by the Family Court to justify pre-trial incarceration...are in fact released by prosecutors or by the Family Court within days or weeks.

(J.A. 103-104). The majority concluded that, since the "unconstitutional impact of the statute results directly from its substantively and procedurally unlimited terms" and since individual litigation by individuals adversely affected is a "practical impossibility," the statute

is "invalid as to all juveniles." (J.A. 113-114).

In a concurring opinion, Judge Newman re-emphasized the narrowness of the court's holding:

> It is not necessary in this case to assess the ultimate issue whether the Constitution prohibits pretrial detention on the basis of uncertain predictions of future criminal behavior. [Citation omitted]. The far narrower issue here is whether the risk of an erroneous prediction about future crime is high and whether safeguards not included in section 739(a)(ii) would be of value.

(J.A. 120). Rather than relying upon the majority's conclusions regarding the actual numbers of juveniles either mistakenly or punitively detained, the concurrence held the statute violative of due process:

> not because it has been shown to yield an unacceptable number of mistaken or impermissible results, but simply because it needlessly creates an unacceptable risk of such results.

(J.A. 117-18).

Declaring that the statute:

> permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion as to an issue of considerable uncertainty - the likelihood of future criminal behavior

(J.A. 117), Judge Newman identified five particular deficencies in the statutory scheme which, if rectified, would reduce the risk of error and comport with due process:

> First, the statute places no limits on the crimes for which the person subject to detention has been arrested. ... Second, the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused. ... Third, the judge is not required to assess the individual's background. ... Fourth, the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released. ... Fifth, the statute does not specify any standard of proof by which the judge must be persuaded of a serious risk of future crime.

(J.A. 121-122).

B. Juvenile Delinquency Proceedings in New York State

Since 1978, New York State has had a dual system for prosecuting juveniles accused of committing acts which would be crimes if committed by adults. Children over thirteen years of age charged with homicide and children over fourteen years of age charged with kidnapping, arson, rape and other serious felonies are subject to prosecution as "juvenile offenders" in the adult criminal courts. New York Penal Law §10.00(18).[9]

Juveniles charged with less serious crimes, as well as those who are too young to be subject to juvenile offender prosecution or whose cases have been "removed" from the criminal courts,[10]

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[9]Ironically, these more serious offenders, like adult criminal defendants in New York, may not be preventively detained.

[10]See New York Criminal Procedure Law §§ 180.75, 190.71, 210.43 and 725.

are subject to prosecution as juvenile delinquents in the Family Court. All alleged juvenile delinquents are subject to the preventive detention provision, F.C.A. § 320.5(3)(b), at issue on this appeal.

On July 1, 1983, a new juvenile delinquency procedural code was implemented in New York State (F.C.A., Art. III; Laws of 1982, chs. 920, 926). Most of the substantive law of the former delinquency statute has remained intact, including former § 739(a)(ii), at issue in the courts below, which has been recodified verbatim in the new act. See F.C.A. § 320.5 (3)(b).[11]

Upon being brought to Family Court for processing, most accused delinquents are interviewed by the local probation

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[11] Appellees fully concur with appellant's position that passage of the new code, with former F.C.A. § 739(a)(ii) simply recodified as § 320.5(3)(b), in no way moots this appeal. Appellant's Brief at 22-23.

service ("probation intake") for possible informal resolution of their cases prior to filing a petition ("adjustment"). F.C.A. § 308.1; J.A. 53-54, 129,136,141-143.

Probation's inquiry lasts from ten to forty or forty-five minutes. The parent, guardian, complainant or arresting officer may or may not be present. The juvenile is not entitled to counsel. The purposes of the interview are twofold -- to determine the possibility for adjustment, as well as to gather information upon which to base a detention/release ("parole/remand") recommendation to the family court, should the case go before the court. There is no "professional psychiatric or psychological examination"[12] and the interview may or

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[12]Such examinations may occur at a later stage, to aid the court in determining mental capacity to stand trial or an appropriate disposition.

interview may or may not be conducted by a probation officer with a professional degree.[13] (J.A. 54-56, 147-148,152-153).

The recommendation to release or detain is based on whether the probation officer "feels that the child may be a calculated risk if returned to the community." (J.A. 143)[14]

After a petition is filed, the accused juvenile makes his "initial appearance" (arraignment) in the family court intake part. F.C.A. § 320.1 et

(footnote continued)

F.C.A. §§ 322.1,351.1. However, there is no procedure for pre-petition evaluations to assist probation in making recommendations. (J.A. 152).

[13]Although probation intake officers are required to have masters degrees in social work, sociology or related fields, or bachelors degrees in these fields plus two years paid related work experience, many simply possess the latter. (J.A. 54, 147-48).

[14]Mr. Benjamin, who has performed thousands of such interviews stated that this feeling is based, in part, on the "attitudes" of the parties present. (J.A. 144).

seq. It is at this appearance that the court makes the determination to detain or release. The appearance is quite perfunctory, lasting only five to fifteen minutes. As the Court of Appeals found, at the initial appearance Family Court judges simply have before them a petition and affidavit, if any,[15] a recommendation by son officer") who had not personally conducted the interview(s), and statements, if any, by the child, his attorney and accompanying parent or other adult. (J.A. 104,106,251-259). As noted by the district court, "often a probation representative ("court liai-

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[15]Contrary to appellants' implication, a family court petition is no more a "probable cause" petition than is a criminal court accusatory instrument. It simply represents a prosecutor's decision to prosecute, untested by judicial review. See Gerstein v. Pugh, 420 U.S. 103,118 (1975). The sufficiency of the petition is not tested at the initial appearance, but may be tested at the probable cause hearing or by written motion within 30 days of the appearance. F.C.A. §§ 315.1(3); 332.2.

there is no one present with personal knowledge of what happened." (J.A. 57). While brief inquiries may be made of the parent or other adult who may be present with the child,

> no inquiry is made into the non-hearsay allegations of the truth of the charges, and no testimony in taken under oath.

(J.A. 56-57,72).[16] Although present, counsel typically is assigned to the child just as the hearing begins. Thus,

> he takes on responsibility for the proceedings only moments before convincing reasons must be presented to the court for not ordering pretrial detention.

(J.A. 72).

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[16]Judge Quinones, in fact, flatly denied that complainants present oral evidence at detention hearings in lieu of affidavits attached to petitions drawn on information and belief:

> I don't see how that would happen, because if you had their presence, you would have the person sign the petition itself. I don't see how that would happen. (J.A. 252).

On the basis of the limited information presented during the brief detention hearing, the Family Court judge orders detention or release based on an assessment of the likelihood of crime commission during the period of time between the initial appearance and the "return date", or next immediate adjourned date, generally a period of "several weeks." (J.A. 263).[17] The only statutory guidance for making this determination is F.C.A. §320.5(3), which provides:

> The court shall not direct detention unless it finds and states the facts and reasons for

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[17]Thus, contrary to intervenor-appellant's assertion, the judge's assessment at the detention hearing covers a far shorter time span than the 120 days generally permitted for trial under F.C.A. § 340.1(3). Likewise, it is a far shorter time span than the period which Professor Wilkins testified is the peak period for recidivism of convicted individuals following release from incarceration. Professor Wilkins established that period as "between about 3 months to 6 or 9 months" after release. (J.A. 201).

> so finding that unless the respondent [juvenile] is detained:
>
> (a) there is a substantial probability that he will not appear in court on the return date; or
>
> (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.[18]

As found by the Court of Appeals, in making detention determinations under the latter standard, Family Court judges generally "emphasize matters going solely to the protection of the community" -- e.g. "prior record, recent court contacts, seriousness of the charge, and adequacy of supervision" --but not "interests of the child," a consideration relevant only at disposition. (J.A. 104-10; see also J.A. 263-267). While these general considerations prevail, any juvenile with any background may be

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[18]While §320.5(3)(b) is challenged as unconstitutional, §320.5(3)(a) is not at issue in this proceeding.

detained. There are no limitations in the scheme; "[e]ach judge follows his own individual approach to this determination." (J.A. 57).[19]

Additionally, external influences have been recognized as having an effect on judicial decision-making about detention. Steven Hiltz stated that the detention rate "varied dramatically given the political climate." (T. 60). Professor Wilkins recognized the "risk aversive" tendency of decision-makers who must enforce this kind of scheme

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[19]While common factors are considered, neither Judge Quinones nor Judge Driscoll, the two judges testifying on behalf of intervenor-appellant, testified that the various criteria that they use in rendering detention determinations are identical to those utilized by other judges in their jurisdictions. Both limited their testimony to the factors they themselves consider. (J.A. 263,269,272,319-322,327-328). According to Judge Quinones: "I guess we all have our standards and we all have measures of determining in our minds the seriousness of the allegations." (J.A. 265).

(J.A. 203).[20] Intervenor-appellant's expert, Michael Bigley, testified, in the same vein, that recent shifts in "conservative attitude" may have altered the judges' thinking about the detention concept (J.A. 178).

If the juvenile is detained by the Family Court for more than three days, a probable cause hearing must be held within six days of the initial appear-

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[20]This tendency is particularly evident when there is a risk of adverse publicity. As Judge Quinones testified:

> I think that judges are human beings just like anybody else and I believe that one of the factors that does influence some judges is the newspapers. Yes, I believe that that could be one of the considerations.

(J.A. 273). And Judge Driscoll stated:

> [If I had a psychological profile of the child before me at arraignment] it could present a problem, because if I didn't detain him and he then committed something else, I'd be in trouble. (T.682)

See also PX 13a, p.3.

ance. F.C.A. §§ 325.1(1),(2),(3). At the hearing, the prosecution must present evidence sufficient for the court to determine "whether it is reasonable to believe that a crime was committed; and ... that the respondent [juvenile] committed such crime." §§ 325.2,325.3[21] If continued detention has been ordered, the fact-finding hearing (trial) must be held within 17 days after the initial appearance if the juvenile has been charged with an A, B or C felony or within 6 days for other offenses, unless the accused requests a further delay. F.C.A. § 340.1.

Upon entry of an admission (guilty plea) or adjudication after trial, the case must be set down for a dispositional hearing, at which the juvenile's need

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[21]With certain exceptions, this evidence must be sworn and may not be hearsay. F.C.A. § 325.2 (2),(3).

for "supervision, treatment or confinement" must be ascertained. F.C.A. §§ 301.2(7), 352.1. Dispositional hearings differ from the detention determinations at issue in the present case in that at the dispositional phase,

> elaborate statutory provision is made for collecting diagnostic and other information, and specific criteria are established to guide the Family Court Judge.

(J.A. 102). Comprehensive probation investigations must be ordered for all felony cases and as a prerequisite to all placements; psychological and psychiatric diagnostic assessments are mandatory in certain felony and mental health placement cases and are discretionary in other cases. F.C.A. §§ 351.1(1),(2),(3).

In rendering its dispositional order, the Family Court "consider(s) the needs and best interests of the respondent as well as the need for protection

of the community" and must state its reasons for a particular disposition; except for the most serious felony cases, the court is obligated as well to order the "least restrictive available alternative" consistent with these interests. F.C.A. §§ 352.2(2),(3). (See also J.A. 106 n.25, 279-280).[22]

C. Detention Pursuant to Family Court Act § 320.5(3)(b).

1. Purposes and Effects of Detention

It is undisputed that the express legislative purpose of detention pursuant to F.C.A. § 320.5(3)(b) is to protect the community. (Brief for Appellant Schall at 23-25.) This was the unanimous finding of both courts. (J.A. 67-90, 104-05,114). Appellant's witness, Fami-

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[22]The court's dispositional options include conditional discharge, probation, placement with the Division for Youth or the Department of Social Services and, in serious felony cases, restrictive placement. F.C.A. §352.2(1).

ly Court Judge Cesar Quinones, aptly set forth the aims of detention:

> I believe that the purpose of 739(a)[(ii)] [now § 320.5(3)(b)] is really protection of the community. I believe that's the basic purpose for that provision.
>
> * * *
>
> If it serves the child's interests at all, it would be the minimal benefit that while he is in detention, he is not committing another crime, if that can be called a benefit to the youngster, but I don't believe that detention is actually for the benefit of the youngster, not under this statute.
>
> I certainly would not remand anybody for benefit. Perhaps you might find a rare case where somebody might be so favorably or so shockingly affected by a short stay in Juvenile Center that that might turn him around, but I don 't believe that is the purpose he is put there, no. You don't put them in for their own good, I'm sorry.

(J.A. 105 n.24, 270).

Quite the opposite of serving the interests of accused delinquents, Judge

Quinones noted the harmful effects of detention:

> In my opinion, all [detentions], juvenile or adult, can have bad effects. For one thing, we are talking about youngsters of tender age. You are taking them away from their family. I mean, that's bound to have a psychological[ly] ... detrimental effect on them.
>
> * * *
>
> Then again Juvenile Center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they possibly might be and it might have a bad effect in that respect.

(J.A. 105 n.24, 107 n.29, 270).

Appellant Schall, in her brief at 46-47, concedes the "deleterious effects that pretrial detention may have on a juvenile." Undisputed testimony by Mr. Hiltz, and Dr. Zinn clearly spelled out

the detrimental impact of detention both upon the juveniles and upon the ability of defense counsel to prepare defenses and obtain favorable dispositions. Additionally, serious actual and potential harms were cited by intervenor-appellant's experts, Michael Bigley and Ralph Kelly, both of whom were familiar with the realities of detention in New York State.

Mr. Hiltz testified that pretrial detention significantly impedes defense counsel in the preparation of an accused juvenile's case, thus rendering adjudication and placement more likely (J.A. 130-134). First, detention leads to a greatly quickened pace for trial, substantially shortening the defense attorney's preparation time. (J.A. 130). Second, trial judges may be prejudiced toward a child who comes from detention. The fact that they know that "there is

something in this person's background that led another judge to decide that he could not be released before trial," renders the trial more difficult. (J.A. 131,133).[23] Third, because Spofford Juvenile Center, New York City's detention center, is inconveniently located, it is relatively inaccessible to defense counsel, particularly court-appointed counsel, who have to visit in the evening in light of heavy case loads (Id.). Fourth, the identification of witnesses critical to the juveniles' cases, becomes problematic for clients in detention. (J.A. 131-32).[24] Finally,

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[23]Mr. Hiltz testified that detained juveniles are brought to family court in handcuffs (J.A. 130).

[24] Without the client's actual presence and assistance, defense investigators frequently are unable to find the witnesses needed to testify on the accused juvenile's behalf. (J.A. 131-32). Mr. Hiltz explained that often his clients do not know last names or addresses of potential witnesses (J.A. 132).

Mr. Hiltz stressed that a convicted juvenile placed in detention is prevented from participating in counseling programs, or from applying him or herself to available school programs, evidence of which favors a non-placement disposition. (J.A. 133-34).[25]

Dr. Zinn addressed the detrimental psychiatric consequences of detention for children. He broke down the potentially harmful effects of detention into two areas. First, the detention experience can significantly impede children's moral development and socialization, thus rendering future crime more

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[25] Children who are paroled pending trial are generally paroled after trial, as they are able to illustrate, by their good behavior in the community pending disposition, that they do not need to be sent away. (J.A. 134). Because judges also tend to continue a previous judge's remand decision, detained juveniles convicted at fact-finding are denied that opportunity to put forth a good record of behavior. (Id.).

likely.[26] Second, he outlined the consequences of the detention itself -- i.e., the real consequences of separation from family and from community and as an aspect of community, the school. (J.A. 232).[27]

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[26]Dr. Zinn testified (J.A. 231):

> For a young person who has not in fact committed the crime in question, * * * [i]n terms of the meaning of the experience, for the early adolescent, the police and, as the early adolescent gets older, the judiciary are the foundations of moral order in the society and in effect organizational social functioning. To be treated in a way that does not reflect their conduct, can leave them questioning the validity of that moral process.
>
> Once these vicious cycles, as kids go through the system, and problems develop and the more the problems develop the more distrust develops in the young person and the less cooperative they are and the less they come to believe that the police and the courts do in fact responsibly reflect moral order.

(J.A. 231).

[27]Dr. Zinn stressed how considerations unique to children can exacerbate these effects (J.A. 232):

> While a few days to a few weeks may not be so important to an adult, to a

Finally Dr. Zinn indicated that the "exposure to delinquent subcultures" inherent in the detention experience may also have harmful implications for juvenile detainees and may become a self-fulfilling prophecy for future court involvement (J.A. 233):

> The more a young person becomes involved with the court and with court placement, the more likely it will be that they will have subsequent court involvement. So one would add to the effects the possibility of directing the young person away from the mainstream of adolescent development and more in terms of a delinquent subgroup.

(footnote continued)

young person, that time is infinitely longer having lived for a relatively shorter period of time.

Of course, in many school programs, it is very difficult to make up work and get back on target. ... there is fairly strong evidence of a pattern with delinquent young people of falling behind in school, of suffering a blow to their self-esteem which makes it that much harder for them to function which pushes them that much more to the periphery of appropriate developmental activities and vicious cycles get set up accordingly.

Focusing on the detention experienced by appellee class members, intervenor-appellant's expert, Michael Bigley, testified that Spofford is a high security setting in which accused and convicted offenders are commingled with the pre-trial and post-trial delinquent population. There are strip searches, monitors at the entrances, solitary confinement, and bars on the windows. (J.A. 168-170). Mr. Bigley also testified that some youths are detained in county jails, with D.F.Y. approval as authorized by F.C.A. § 304.1 (2). (T. 290)[28]

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[28]In addition to his testimony, a D.F.Y. report Mr. Bigley helped to prepare, Juvenile Detention in New York, 1977, Policy and Practice, was placed in evidence (PX 36). This report states, inter alia:

> [T]he most subtle but perhaps the most harmful effect of secure detention is the creation of, and the impression left by, a high security atmosphere which is concerned about possible breaking out and physical attacks against staff.

Also addressing appellees' experience, Mr. Kelly described the detrimental consequences of being detained at a large institution such as Spofford (J.A. 295). He noted the problem of assaults by inmates upon staff and other inmates, the difficulties presented by the presence of sentenced inmates and the use of strip searches, room and group confinement.[29] (J.A. 295-297,303-304; T.566).

(footnote continued)

* * *

> [T]here is the potential of contamination of the less sophisticated by those more sophisticated in crime. Potential exposure to violence in detention facilities is present. Assaults, suicides and rapes in detention facilities have been documented by various authorities.

Id. at 20, 21; See also J.A. 167-68, 172.

[29]Group confinement involves the restriction of an entire dormitory of youths even for the acts of only a few. (J.A. 297-298).

2. Arbitrariness of Detention

The conclusion of the Court of Appeals that detention pursuant to New York's statutory scheme is imposed punitively derived in large measure from the "procedurally and substantively unlimited terms" of F.C.A. § 320.5(3)(b) and the results in practice of the unfettered discretion it accords. All alleged juvenile delinquents are eligible for detention, regardless of the offense charged and regardless of record, even if they have never before been arrested. In the absence of any limitation on the Family Court judges' discretion to detain or uniform criteria to guide their decisions, the panel ruled that

> the vast majority of the pretrial detentions involve either mistakes in judgment ... or the imposition of incarceration solely as punishment for unadjudicated crimes.

(J.A. 112).

As noted above, each judge follows his "own individual approach" in making detention decisions in the course of summary initial appearances. (J.A. 57). Political attitudes, fear of publicity, subjective personality factors, attitudes towards particular charges,[30] combined with generalized considerations about protection of the community, lead to a "process riddled with subjectivity and caprice", replete with numerous instances of unnecessary and arbitrary detention. (J.A. 70).

Examples of the results of such "unbridled discretion" (J.A. 70,122) can be seen in some of the district court's unanimously affirmed findings (J.A. 71):

> It is clear that the judge decides on pretrial detention for a variety of reasons -- as a means of protecting the communi-

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[30]Some judges, for instance, automatically remand all youngsters charged with weapons offenses. See, e.g., PX 1a, p.8; 6a, p.3; 42 p. 11.

> ty, as the policy of the judge to remand (Exhibit 6a, p. 3), as an express punitive device (Exhibit 42, p. 11), or because of the serious nature of the charge (Tr. 465, Exhibit 13a, p. 3), among others.

Further, the court found:

> Whether the juvenile was a first offender with no prior conduct, whether the court was advised that the juvenile was an obedient son or was needed at home, whether probation intake recommended parole, the case histories in this record disclose that it was not unusual for the court to discount these considerations and order remand based on a 5 to 15 minute evaluation.

(J.A. 83; see also J.A. 84-85).

Upon examining statistical evidence presented by both sides, as well as records of the 34 sample cases presented by appellees,[31] the courts below identified

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[31] These case histories concerned only youths detained preventively and were found by the district court to reveal "arbitrary and capricious action in its crudest and rawest form". (J. A. 83) [Emphasis supplied]. While the sample is concededly too small for precise statistical conclusions to be drawn, the case histories fully corroborated the statistical patterns evident

several classes of juveniles, constituting the overwhelming majority, for whom detention under the challenged provision was arbitrary and therefore unconstitutional.

First, because juveniles accused of all types of crimes are subject to detention, detention for nonviolent and trivial crimes predominated. The case histories included juveniles detained for "stealing a pair of shorts", for

(footnote continued)

in the aggregate data presented. The representativeness of these case histories was never challenged by appellants (J.A. 103, n. 19) and, in fact, undisputed testimony by Steven Hiltz established that the cases were quite typical. (J.A. 128). Although appellants continue to dispute the conclusions drawn both from the case histories and aggregate data, the Court of Appeals noted:

> Although the defendants have superior access to generalized statistics and at least an equal opportunity to present a counter-sample of case studies, they chose to rely solely upon the most vulnerable data in the record.

(J.A. 103, n. 18)

playing "three-card monte," a form of street gambling, and for "steal[ing] a quantity of subway-bus transfers".[32] Moreover, the Vera study introduced at trial indicates that 33% of those charged with B misdemeanors, 24% of those charged with A misdemeanors, and 41% of those charged with the lowest felony charge in New York -- E felonies -- are detained before trial (PX 44).

Second, because F.C.A. § 320.5(3)(b) has no specific requirements for prior delinquent histories, a sizeable number of first offenders were preventively detained. In appellees' case sample, for example, at least 23 of the 34 juveniles had no prior delinquency adjudications at the time of the deten-

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[32] See PX 8a,18b,21b.

tion hearing.[33]

Third, the district court identified the category of detainees (including 16 of the 34 case histories) against whom application of the preventive detention statute was deemed most "pernicious" - i.e., detainees who had been released by police upon arrest to their parents or guardians, and who had not been accused of any infractions during the "roughly five days to over a month" prior to their detention hearings. (J. A. 65).

Fourth, both courts below emphasized the overwhelming percentage of

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[33] See PX 1a,2a,4a,5a,6a,7a(2 juveniles),10a,11a, 12a (2 juveniles),13a,14a,15a,16a,19a,20a,23a,24a, 27a,28a,35a,43a. Of these, one (PX 2a) had an adverse fact-finding which was dismissed without an adjudication. Nine juveniles had absolutely no prior contacts with the Family Court. See PX 6a, 7a (2 juveniles), 10a, 11a, 12a, 13a, 14a, 19a. Additionally, insufficient information was available to assess the extent of delinquent histories in two cases. See PX 18a, 29a.

youths preventively detained but ultimately sent home as indicative of the arbitrariness of the detention scheme -- i.e., the lack of any connection to actual crime prevention purposes, even assuming, arguendo, that such purposes were deemed to justify the detention. As found by the Court of Appeals:

> [O]ne critical fact has been established--the vast majority of juveniles detained under [former F.C.A.] §739(a)(ii) either have their petitions dismissed before an adjudication of delinquency or are released after adjudication.

(J.A. 103).

The court relied upon a study prepared by the Vera Institute of Justice which established two patterns: (a) of detained juveniles, "49% have their cases dismissed before trial, 21% are dismissed or released after trial, and only 30% are restrictively placed;" and (b) the pretrial detention rate (one

third of all delinquency petitions) is far higher than the restrictive placement rate (11% of all petitions) (J.A. 102).[34]

Finally, adopting intervenor-appellant's analysis of the 32 cases in appellees' sample for which dispositions were known, the Court of Appeals noted that "well over two-thirds of the juveniles ... were released at or before the dispositional hearing" --specifically, 23 (or 70%) of the juveniles, of whom 12 had their cases dismissed, withdrawn or adjourned in contemplation of dismissal and 11 received probation or a suspended sentence. (J.A. 103).

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[34] See PX 44. The term "restrictive placement" is used as the term is commonly understood, not as it is more narrowly defined in F.C.A. §301.2(11). It should be noted that the record below also included data from the New York State Division for Youth to like effect. See SX 03, P3, Q3, R3.

On the basis of this evidence, the Court of Appeals concluded:

> The vast majority of the pretrial detentions involve either mistakes in judgment fostered by [former] § 739(a)(ii)'s procedurally and substantively unlimited terms or the imposition of incarceration solely as punishment for unadjudicated crimes.

(J.A. 112). The panel's conclusion that preventive detention remands are in actuality imposed as punishment derived from its findings that: (1) a large number of juveniles were detained despite evidence so "weak or insufficient" that they were ultimately never adjudicated; (2) many juveniles detained were mistakenly deemed to be dangerous in the "summary hearing" held under § 320.5(3)(b) but upon adjudication were released to the community; and (3) many juveniles detained were released upon disposition by the Family Court because the time served, including the preventive deten-

tion period, is frequently considered sufficient punishment. (J.A. 111-112). The court found no compelling interest to justify detention as to any of these groups and held as to the latter

> [D]etention serves the purpose of punishment rather than crime prevention, since early release - within days or at most a few weeks - by a Family Court Judge contradicts any asserted need for pretrial confinement to protect the community.

(J.A. 112)(footnote omitted).

The arbitrariness of the detention decisions made under New York's statutory scheme is evident not only by the results manifested but also by the overprediction which is inevitable from the process used in assessing whether juveniles before the Family Court present a serious risk of crime commission. The district court relied upon the finding of appellees' expert, criminologist

Leslie Wilkins[35] that:

> [H]e would be surprised if recommendations based on intake interviews were better than chance and assessed the judge's subjective prognosis about the probability of future crime as only 4% better than chance --virtually wholly unpredictable. He testified that no method had yet been devised which could predict with any acceptable degree of accuracy that a juvenile shall commit a crime, particularly the commission of an offense in a short space of time, as the judge must do in making his § 739 decision.

(J.A. 72).[36] Professor Wilkins observed that the shorter the period of risk --in this case, the interval of a few weeks during which the child would be paroled pending the next court date (J.A. 263) -- the more difficult and arbitrary the

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[35]Intervenor-appellant, in his brief at 20, misrepresented Professor Wilkins' testimony. He never expressed a moral objection to detention; he simply expressed a moral objection to "attempting to predict people who will be delinquent, ... who are not already delinquent." (J.A. 219)[emphasis supplied].

[36]Dr. Zinn testified to the same effect. (J.A. 234).

assessment of likelihood of crime, rendering it no better than randomly choosing from the population at large:

> [A]s [the base] rate drops, the likelihood, for example, of a person who has committed a violent crime, committing another violent crime in a given interval of time that probability really begins to get very, very small. So as you subdivide the groups or as you truncate time, so the percentage in the category you are looking for diminishes until you get to the proverbial needle in the haystack which not even statisticians can find.

(J.A. 194-195; see also J.A. 209.)[37]

For these reasons, as the district court concluded, appellees are deprived of pre-trial liberty based on "judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates." (J.A. 81).

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[37]In cases of first offenders, the probability of crime commission within such a short interval "would normally be extremely small indeed." (J.A. 208).

SUMMARY OF ARGUMENT

Appellees contend that a deprivation of liberty prior to adjudication of guilt pursuant to a predictive judgment of dangerousness to the community is per se unconstitutional. Punishment before trial is impermissible whether imposed on juveniles or adults. However, it is not necessary to reach this issue in this case. Whatever the constitutionality of a narrowly tailored, well-written preventive detention statute, the New York statute challenged in this case fails to meet minimal acceptability in three respects. New York's law is unconstitutional because: (1) it does not contain precisely drawn objective standards; (2) it is not limited to situations involving a very serious risk of harm to society; and (3) it does not provide procedural protections designed to assure the accuracy of the judgment

that the accused would commit a crime if released.

Incarceration involves a massive curtailment of liberty. Detention is even more damaging to juveniles than it is to adults. Only a social need of the highest order could justify detaining juveniles before an adjudication of guilt. The broad reach of New York's statute exceeds any conceivable governmental interest.

The unanimous finding of the courts below is that the vast majority of juveniles detained under the statute are detained unnecessarily without furthering any legitimate governmental interest. Whether one views the infirmity in the statute as yielding too high a rate of needless detention or as creating too high a risk of erroneous detention, the result is the same: the statute is constitutionally infirm.

Affirmance of the judgment below will aid the objectives of the juvenile justice system. There is far too much detention before trial administered by juvenile courts. The failure of the juvenile justice system to reduce recidivism is traceable to its policy of punishing before, rather than after, trial. Circumscribing the unfettered discretion to detain will improve juvenile justice while, at the same time, it will protect juveniles from unnecessary loss of liberty.

ARGUMENT

POINT I

NEW YORK'S JUVENILE PREVENTIVE DETENTION STATUTE IS UNCONSTITUTIONAL BECAUSE (A) IT FAILS TO ARTICULATE ASCERTAINABLE STANDARDS FOR APPLICATION; (B) IT IS FAR BROADER THAN NECESSARY; AND (C) IT FAILS TO PROVIDE PROCEDURAL PROTECTIONS DESIGNED TO ASSURE THE ACCURACY OF ITS PREDICTIVE JUDGMENTS.

Under any circumstances, preventive detention raises a host of troublesome constitutional questions. Appellees submit that a deprivation of liberty prior to an adjudication of guilt pursuant to a predictive judgment of dangerousness to the community is flatly inconsistent with our constitutional heritage. However, whatever the constitutionality of preventive detention *per se*, any attempt to impose such a system must, at a minimum, satisfy three preconditions of constitutional dimensions. First, it must contain precisely drawn objective standards governing its admin-

istration. In the absence of precise objective standards, any system of preventive detention risks degenerating into subjective arbitrariness. Cf. Colautti v. Franklin, 439 U.S. 379 (1979); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Second, it must be limited to situations involving a very serious risk of harm to society. It is a truism to observe that something as drastic as preventive detention can never be justified except by the most serious social need. Addington v. Texas, 441 U.S. 418 (1979). Finally, it must provide a series of procedural protections designed to assure the accuracy of the necessarily inexact predictive judgment which lies at its core. Santosky v. Kramer, 455 U.S. 745 (1982).

New York's statutory scheme fails to satisfy any of the three constitutional pre-conditions. As the courts

below unanimously found, its lack of ascertainable objective criteria renders it a wholly subjective process; its broad reach exceeds any conceivable definition of serious social harm; and its lack of procedural safeguards virtually guarantees grossly inaccurate predictive judgments.

New York's statute must fall because of three pervasive defects: (a) the statute authorizes detention to protect the community from any crime, no matter how trivial; (b) the statute authorizes the detention of any juvenile, regardless of previous history; and (c) the statute lacks any procedural guarantees of accuracy.[38] These defects require affirmance without reaching the

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[38]Judge Newman found five defects in the statute. See p.12, supra. However, the five defects he identified are actually illustrations of the three pervasive defects noted in the text.

question of whether a more carefully drawn preventive detention statute could survive constitutional challenge. The broad reach of the statute exceeds any conceivable governmental interest, while the absence of limiting procedural protection impermissibly invites an unacceptable risk of erroneous and unnecessary deprivation of liberty.

In determining the constitutionality of a statutory scheme for effecting pre-trial detention, traditional due process analysis invites the Court to balance the private interests affected, the risk of erroneous deprivation of these interests through the procedures used, the probable value of alternative or additional procedures, and the governmental interest, including the function involved and the burden of alternative or additional procedures.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

A. The Juvenile's Interest In Pre-trial Liberty is Substantial

The interest of appellees' class in their liberty is of "transcending value." Speiser v. Randall, 357 U.S. 513, 525 (1958).

The decision to detain before trial is an important one in any criminal justice system. The time between arraignment and trial has been recognized to be

> perhaps the most critical period of the proceedings ... when consultation, thoroughgoing investigation and preparation ... [are] vitally important.

Powell v. Alabama, 287 U.S. 45, 57 (1932).

Moreover, wrongful detention of juveniles is even more damaging than wrongful detention of adults, as this record demonstrates. Incarceration has the potential to traumatize chil-

dren and to teach them the ways of crime. It can cause difficulties with school. It also increases the likelihood that the accused will be convicted. Finally, it increases the prospect that, once convicted, the juvenile will be sentenced to a restrictive type of placement. See pp.86-91, infra.

Perhaps best summarized by appellants' witness at trial, Commissioner Kelly, there are "detrimental consequences to institutionalization to most people and kids are no different." (T. 571). For these reasons, and aware that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action," Greenholtz v. Inmates of the Nebraska Penal and Correctional

Complex, 442 U.S. 1, 18 (1979)(Powell, J., concurring in part and dissenting in part), the panel below correctly recognized that only a social need of the highest order could justify detaining juveniles before an adjudication of guilt.

B. The Prevention of Petty Crime Is Not a Sufficiently Compelling Social Need to Justify a Scheme of Preventive Detention.

The government's interest in preventing crime is, of course, substantial. However, this does not mean that the government's interest in preventing any crime is sufficient to justify a scheme of preventive detention. Assuming, arguendo, that pre-trial detention is ever permissible for the purpose of crime prevention,[39]

[39]At pages 94-106, infra, appellees contend that preventive detention impermissibly constitutes punishment before trial. Under this rationale,

F.C.A. § 320.5(3)(b) is overinclusive because it allows the incarceration of persons under sixteen based on a prediction that, if released, they would commit any act equivalent to a crime, including joy riding, drawing graffitti, or using an expired bus pass. As the record below demonstrates, many juveniles are detained preventively who have been accused of nothing more than a petty or trivial act. See pp. 38-39, supra.[40]

New York's scheme stands in sharp contrast to the preventive detention law

(footnote continued)
preventive detention is unconstitutional regardless of the substantiality of the government's interest, because the method chosen to further that interest is itself unlawful.

[40]Additionally, a critical problem with the statute's reach to include misdemeanors and other non-violent crimes is Justice Powell's observation in Baldasar v. Illinois, 446 U.S. 222, 231 (1980): "No court can predict with confidence whether a misdemeanor defendant is likely to become a recidivist."

challenged in United States v. Edwards, 430 A.2d 1321 (D.C.App. 1981), cert. denied sub nom. Edwards v. United States, 445 U.S. 1022 (1982), relied upon by appellants. That law authorizes detention only if the accused is charged with a limited number of "crime(s) of violence" or "dangerous crimes." D.C. Code 1973, §§ 23-1331(3),(4).[41]

Of the 33 juveniles in the sample introduced at trial for whom transcripts were available, at least 17 would have been automatically excluded from the reach of the District of Columbia law, either because of insufficiency of serious charges or lack of delinquent his-

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[41]These crimes are defined in the statute, inter alia, as "murder, forcible rape,... kidnapping, robbery, burglary, voluntary manslaughter ... arson, assault with intent to commit any offense, assault with a dangerous weapon,..." D.C. Code 1973, § 23-1331(3),(4).

tory.[42] Another 12 would probably have been excluded for lack of "clear and convincing" evidence of eligibilty[43]; only the remaining four seemed to have been eligible candidates for detention under Edwards.[44]

These findings comport with evidence presented at trial by appellant from the New York State Division for Youth.[45] Using the definitions contained in the District of Columbia Code for "crime of violence" and "dangerous crime", more than half -- 51% -- of all juveniles detained statewide in 1979 would have been automatically ineligible

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[42] See PX 1a,6a,11a,12a(2 juveniles),18a,19a, 21a,25a,43a.

[43] See PX 2a,3a,4a(2 juveniles),5a,8a,14a,23a, 24a,26a ,27a,28a.

[44] See PX 7a(2 juveniles),17a,20a.

[45] See SX O2,P2,Q2,R2.

for detention under the D.C. Code.[46]

Without deciding whether crime prevention may occasionally justify pretrial detention, it is clear that the state's interest in preventing petty offenses "is [not] great enough to justify such a massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972).[47] See also Suzuki v. Yuen,

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[46]See Supplement to Brief for Petitioners-Appellees in the Court of Appeals (Table V). It must be noted that the data does not allow an analysis of prior adjudications or pattearn of past misbehavior which are additionally required under the D.C. Code to justify detention for certain crimes. Thus, of the 49% eligible for detention based on the charge alone, an unknown, but substantial, number would have been ineligible because of lack of requisite history. See D.C. Code §1322(b)(2)(A).

[47]The relatively short length of the detention cannot diminish the "massive curtailment" of liberty. Not only does the deprivation of liberty involve loss of freedom for the duration of the deprivation, but, as already shown, it infringes other fundamental rights as well, including preparation for trial and increases the likelihood of a restrictive placement. Moreover, even relatively short periods of detention may have seriously detrimental effects upon children, particularly in view of their differing senses of time. (See n.27, supra)

617 F.2d 173 (9th Cir. 1980). As Professor Tribe has observed, detaining a person before trial to prevent a "trivial property offense" is impermissible:

> No tenable concept of due process could condone a balance that gives so little weight to the accused's interest in pre-trial liberty.

Tribe, An Ounce of Detention: Preventive Detention in the World of John Mitchell, 56 U. of Va. L. Rev., 371, 381 (1970)[48]

Eliminating petty offenses from the reach of the statute would eliminate the

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[48] See also Note, The Cost of Preventive Detention, 79 Yale L.J. 926, 979 (1970):

> If the degree of danger [to society] is small, the interest of society in detaining the defendant would be outweighed by the cost and burden of detention .... For this reason, most commentators have agreed that preventive detention is permissible only where the crime anticipated is a serious felony or crime of violence.

See also Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1505 (1966).

vast majority of juveniles from eligibility. In such a scheme, as in the District of Columbia, the imposition of preventive detention would become the exception rather than the rule.[49]

Since the juvenile's interest in liberty clearly outweighs the state's interest in preventing trivial offenses, the statute is unconstitutionally over-inclusive.

C. The Lack of Procedural Safeguards Renders the Risk of Erroneous Deprivation of Liberty Too High

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[49]The District of Columbia law is marked by its extremely limited use. A study of the use of the law during its first year concluded: "The chief finding of the first ten months of observation has been the virtual non-use of the preventive detention law." Vera Institute of Justice, Preventive Detention in the District of Columbia 72-73 (1972). After five years, a House Committee observed: "From the date of enactment until [1975], pre-trial detention was rarely requested (only about 60 times during the entire 5 year period)." House Committee on the District of Columbia, H. R. Rep. No. 1419, 94th Cong., 2d Sess. 4 (1976). By sharp contrast, thousands of juveniles have been preventively detained in New York during this period.

a. Section 320.5(3)(b) Provides No Objective Criteria for Detention Decisions

The state's interest in crime prevention, even for serious crimes, is no greater than the juvenile's interest in liberty. It remains to be considered, therefore, whether under the current statute the risk of erroneous deprivation is too great and whether increased safeguards are necessary to avoid needless detention. As Judge Newman commented below: "To state the issue is to answer it." (J.A. 120). The challenged law is a textbook example of a statute without standards. The high rate of unnecessary detention is directly traceable to the standardless quality of the statute. Whether one views the infirmity in the challenged scheme as yielding too high a rate of needless detention, as did the majority

below, or as creating too high a risk of erroneous decision, as did Judge Newman, the result is the same: the statute is constitutionally infirm.

Although the state has a substantial interest in preventing serious crime, it has no interest in detaining juveniles who would not commit crimes if released. As Judge Newman observed in his concurring opinion, the governmental interest in crime prevention is

> of high value in a particular case only to the extent that the pretrial detention of a person will prevent the commission of a crime that he would have committed if not detained.

(J.A. 118-119).

New York's statute is devoid of procedural attributes designed to enhance its predictive accuracy. First, as Judge Quinones conceded, the statute provides Family Court judges with virtually unfettered discretion to invoke

preventive detention. The statutory requirement that a judge find a "serious risk" that a child will commit a crime provides no objective criteria to guide its implementation. The seriousness of the crime, the necessary degree of probability, the nature of the proof, and the relevance of parental care all are relegated to the subjective discretion of a Family Court judge. Not surprisingly, as Judge Quinones testified, the lack of uniform and objective criteria has resulted in a non-uniform and arbitrary application of the statute.

Under New York's scheme, preventive detention is based solely on a subjective guess about the future, rather than findings that the juvenile did something in the past (fled, committed a felony, etc.). As a result, "(a)ny child, regardless of his age, offense, or history of past behavior, may be considered

'dangerous' under present laws." California Youth Authority, Hidden Closets: A Study of Detention Practices in California 61 (1975).

All three members of the panel and the district court found that the procedurally and substantively unlimited terms of the statute provide unfettered discretion to a Family Court judge to order pre-trial detention. An insistence on objective limiting criteria can only enhance the state's interest in detaining only those juveniles for whom there is a substantial risk of serious crime commission.

The record conclusively demonstrates that there are no uniform standards for the decision to detain. The decision is based on the recommendation of a probation officer, after an interview which lasts from 10 to 40 minutes. The court appearance itself usually

lasts only five to fifteen minutes. See pp. 14-19, supra.

The Court of Appeals found that Family Court judges generally consider certain factors ostensibly related to crime prevention. (J.A. 104-105). Beyond these broad considerations, there are no specific uniform criteria considered by all Family Court judges in deciding whether or not to order detention. See pp. 20-21, supra. Such an undue degree of discretion in any statute impinging on constitutional values offends due process of law. See Colautti v. Franklin, supra; Papachristou v. City of Jacksonville, supra.

Judge Quinones indicated in his direct examination, for example, that the judges making the determination to parole or remand "all have our standards and we all have means of determining in

our own minds the seriousness of allegations." (J.A. 265). Indeed, the nature of the scheme begs for subjectivity. Mr. Benjamin, a probation officer for over thirty years, who has performed "thousands" of intake interviews (T. 186), indicated that the probation officer rests the decision to parole or remand on "whether the intake officer feels that the child may be a calculated risk if returned to the community." (J.A. 143). (Emphasis supplied). Moreover, this feeling is based, in part, on the "attitudes" of the parties (J.A. 144). As Judge Fuchsberg observed, in his concurring opinion in People ex rel. Wayburn v. Schupf, 39 N.Y.2d at 691, 385 N.Y.S.2d at 523, the challenged scheme simply "offers no indication whatsoever as to what criteria are to be used in determining when a child poses such a risk."

Appellants' principal response to this is that juveniles are adequately protected against arbitrary judicial detention because F.C.A. 320.5(3) requires the judge to state the facts and reasons for the detention order at the time it is made. (Appellant's Brief, p. 35, Intervenor-Appellant's Brief pp. 44-45). This is no answer.[50] Appellees do not claim that the evidence presented below showing the various bases for detention in New York reveals violations of the statute. Appellants ignore the fact that, in the very cases relied upon by the district court to strike the statute as arbitrary, Family Court judges complied fully with the statute

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[50]Appellants both rely on Kent v. United States, 383 U.S. 541 (1966) for this proposition. Kent is inapposite. It did not consider what are legitimate bases for decisions to transfer. In the procedural context in which that case reached the Court, it was enough to hold that the juvenile was denied a statutory opportunity to be heard.

and stated their findings and reasons for the detention.

Appellees' point is simply that, under the statute, any juvenile can be detained for any reason.[51] The total lack of uniform application demonstrated by the record and the conceded subjectivity of the decision-makers are inherent in the statute and render it constitutionally deficient.[52]

Finally, there is no possibility of effective appellate review because of the short span of pre-trial detention.

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[51]This section does not address the over-inclusiveness of the statute. It is plain that recitation of facts and reasons fails to cure the infirmity of detaining a juvenile to prevent a trivial or minor offense.

[52]An important study by the California Youth Authority, Hidden Closets: A Study of Detention Practices in California 63 (1975), recommends that detention to prevent future crimes "be limited to those charged with an offense which would be a felony if committed by an adult and [that] the circumstances surrounding the offense charged involve [ ] physical harm or substantial threat of physical harm to another."

(J.A. 70,n.29). As the Court of Appeals found, although individual writs of habeas corpus are theoretically possible:

> Individual litigation ... is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined.

(J.A. 113).[53]

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[53]While recognizing that individual writs of habeas corpus are authorized, as in the Wayburn case, the district court found:

> The short span of pre-trial detention makes effective review impossible. Detention is over before appellate review can be obtained. In New York ex rel. Wayburn v. Schupf and in this case, motions to dismiss on grounds of mootness were denied because to hold otherwise would have meant insulating 739 from constitutional challenge. Nonetheless, in reality no juvenile ordered into pre-trial detention can test the validity of his adjudication while he is being held in custody pursuant thereto. (J.A. 70, n.29).

b. Inadequacies of Procedural Safeguards

Apart from the standardless quality of the statute, the absence of certain necessary procedural safeguards increases risk of error in determinations under section 320.5(3)(b). For example, there is no requirement that the state meet a prescribed standard of proof supporting the finding that, if released, the juvenile would commit a crime.[54]

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[54]Although this Court acknowledged the hazards of predicting future behavior, it has allowed such predictions to be made. Barefoot v. Estelle, ___ U.S. ___ (1983). There is, however, a significant difference between the prediction and its degree of error found tolerable in Barefoot and the facts in this case. It is one thing to permit a prediction of future behavior when there already are lawful grounds to deprive an individual of liberty. In such cases, any deprivation of liberty is based on past findings of fact, such as a conviction. It is quite another to permit a prediction of behavior which is itself the only basis for the deprivation of liberty. In this case, juveniles are detained, not because of what they have done in the past, whether previous convictions or the current crime which brought them before the court, but solely because a judge believes that they may commit a crime in the future. Barefoot provides no precedent for this drastic exercise of judicial power.

Indeed, the statute itself creates an intolerable degree of confusion as to the required degree of probability by utilizing different bases for detention in subsections (a) and (b) of section 320.5(3). When applying section (a), dealing with the risk of flight prior to trial, a judge must find a "substantial probability" of flight. However, in section (b), a judge must find only a "serious risk" of crime. This diminished degree of uncertainty cannot justify preventive detention. See, e.g., Santosky v. Kramer, supra; Addington v. Texas, supra. Similarly, there is no requirement that the judge ordering detention evaluate the degree of likelihood that the juvenile committed the crime of which he is accused. Neither probable cause nor a substantial proba-

bility of eventual conviction need be shown. Finally, there is no required showing that, upon conviction, there is a probability of eventual restrictive placement.[55]

The unnecessarily inclusive extension of New York's statute to petty crimes, coupled with the lack of objective criteria for its administration and the lack of rudimentary procedural safeguards designed to assure accuracy of application have resulted in a preventive detention scheme under which the vast majority of children detained under the statute are released after trial because they never should have been de-

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[55]The District of Columbia law relied upon by appellants requires, as a condition of eligibility for detention, clear and convincing proof of a past record of violent criminal behavior, and a finding of "substantial probability" of guilt in the present case. D.C. Code 1973 §§ 23-1322(a)(1,2), 1322(b).

tained in the first place. Given the conceded significance of the liberty interest at stake and the obvious state interest in assuring that preventive detention occurs only when necessary, the decision of the lower courts that New York's scheme cannot pass constitutional muster in its present, chaotic form is clearly correct.

POINT II

THE JUVENILE JUSTICE SYSTEM WILL BE IMPROVED BY AFFIRMANCE.

A. Too Many Juveniles Are Needlessly Detained

Amici propose that this Court reverse the judgment below in order to maximize the freedom of juvenile court judges to "help" children. For example, the Brief Amici Curiae on Behalf of Pennsylvania, etc. (hereinafter "Amici 23 States") argues (p.21):

> (b)y use of preventive detention in cases in which it is likely that the child will soon commit

> another crime, the juvenile justice system seeks to break the pattern, spare the child additional rehabilitation or punishment, and aid the child in maturing into a law-abiding citizen.

This reasoning would take this Court back to a jurisprudence which refused to review meaningfully constitutional challenges to juvenile delinquency statutes because of the high-minded purpose of the state and because children have fewer constitutional rights than adults. That jurisprudence is long past. As Chief Justice Burger said for a unanimous Court:

> We believe it is simply too late in the day to conclude...that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.

Breed v. Jones, 421 U.S. 519, 529 (1975). Since In re Gault, 387 U.S. 1

(1967), the standard for "determining the applicability of constitutional rights [ ] in juvenile proceedings, requires that courts eschew the 'civil' label-of-convenience which has been attached to juvenile proceedings'...and that the 'juvenile process...be candidly appraised.'" Breed v. Jones, 421 U.S. at 529. (quoting In re Gault, 387 U.S. at 21 and 50.) It is a "candid appraisal" of the statute and its operation which requires affirmance of the judgment rendered below.

When this Court has been reluctant to apply clear constitutional principles to juvenile proceedings, it has been out of a concern that mechanical interference with the process "'might well destroy the traditional character of juvenile proceedings.'" McKeiver v. Pennsylvania, 403 U.S. 528, 540

(1971).[56]

With the exception of the denial of the right to trial by jury, "the Court's response...has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions." Breed v. Jones, 421 U.S. at 528-29. This response has, in part, been due to a recognition "that there is a gap between the originally benign conception of the system and its realities." Id.

Affirmance will not interfere with the administration of the system, anymore than the imposition of a higher standard of proof did so in In re Winship, 397 U.S. 358 (1970). Affirmance will, of course, affect in a sub-

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[56]As Judge Gurfein observed: "A contrary decision in McKeiver might conceivably have sounded the death knell for juvenile courts as we know them." United States ex rel. Murray v. Owens, 341 F.Supp. 722, 726 (S.D.N.Y.), rev'd, 465 F.2d 289 (2d Cir. 1972), cert. denied 409 U.S. 1117 (1973).

stantive way the conditions under which juvenile court judges may detain juveniles upon arrest.

The unbridled discretion to detain juveniles upon arrest, even for first and trivial offenses, should be circumscribed. This case comes to this Court with unanimously affirmed findings of fact that the vast majority of juveniles detained pre-trial are released as their ultimate disposition.

Not only does the record clearly show that most juveniles detained in New York are not finally placed out of their homes, but New York's ratio of detention to ultimate disposition comports with the juvenile justice system nationally. Time and again observers of juvenile justice have commented on the inordinate use of pre-trial detention. As Professor Franklin Zimring recently wrote:

> The juvenile court's well documented use of detention after arrest

> as a substitute for formal adjudication represents a troublesome social control device that is not visible when only the post-trial sanctions are examined. This is important because nationwide detention is about seven times as frequent as post-adjudication commitment to secure facilities. It is difficult to view detention practices as part of a sentimental general theory of youth protection.

Zimring, Kids, Groups and Crime: Some Implications of a Well-Known Secret, 72 Journ. of Crim. Law and Criminology 867, 882 (1981) (footnotes omitted). In 1978, a particularly important report noted:

> On any given day, about 11,000 minors are held in secure detention, that is to say, under lock and key. ...Each year, about 400,000 minors are detained before trial, eight times as many as are sent to secure facilities after a dispositional hearing.

Confronting Youth Crime: A Report of the Twentieth Century Task Force on Sentencing Policy Toward Youth Offenders,

50-51 (1978). (footnote omitted.)[57]

Not only are the vast majority of detained youths released from custody after the pre-trial phase, but, for the country generally, "(t)he one punitive disposition available for informally processed offenders is temporary detention." Confronting Youth Crime, 52 (footnote omitted.) A noted sociologist has observed that:

> the modern American strategy for correcting juveniles tends to rely on an emergent policy. The unstated policy is: offer more juvenile detention jailing than any other correctional response.

Lerman, Discussion of 'Differential Selection of Juveniles for Detention,' Journal of Research in Crime and Delin-

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[57]See also, National Council on Crime and Delinquency, Correction in the United States, 13 Crime and Delinquency 1, 11, 15, 36 (1967); Ferster, Snethen, and Courtless, Juvenile Detention: Protection, Prevention, or Punishment?, 38 Fordham L.Rev. 161 (1969).

quency 166, 168 (July 1977)(emphasis in original).

In response to this practice, the National Council on Crime and Delinquency has declared:

> Juvenile detention is frequently misused as an immediate punishment for delinquent acts. If punishment is the Court's only disposition, it ought to be administered only after the facts are in -- not as an immediate reaction to the charge.

National Council on Crime and Delinquency, Correction in the United States, 13 Crime and Delinquency 11 (1967).

It is this quality of juvenile justice which has led observers to note the "Alice in Wonderland" dimension of juvenile justice.[58] As Judge Quinones

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[58]In Lewis Carroll's Through the Looking Glass, the queen observes that the king's messenger is "in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all." Perplexed, Alice asks, "Suppose he never commits the crime?" "That would be all the better, wouldn't it?" replied the queen. L. Carroll, Through the Looking Glass 88 (Harper & Brothers ed. 1902).

explained New York's system at the trial below: pre-trial detention serves the "protection of the community" (J.A. 269; T. 509), whereas "the main purpose of the dispositional hearing...would be the best interest of the child." (J.A. 279).[59] In the words of the Juvenile Justice Standards Project, "(t)he result, paradoxically, is considerably less detention under better conditions once the juvenile justice system ceases to presume that the

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[59]This difference between the purposes of pre-trial detention and the purposes of final sentence lends itself to unnecesary detention for still another reason. As the district court noted, "there is a substantial problem of over-prediction... [of] persons potentially dangerous who, if subsequently released, would engage in no further violent or even criminal behavior. (J.A. 73) The "conservative" decision is to detain. This tendency to over detain was described by Professor Wilkins as being "risk aversive" (J.A. 203) See pp. 21-22, supra. See also, Bazelon, Institutionalization, Reinstitutionalization and the Adversary Process, 75 Colum.L.Rev. 897, 900 (1975); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif.L.Rev. 693, 711-19 (1974).

child is innocent." American Bar Association/Institute of Judicial Administration, Juvenile Justice Standards Project, Standards Relating to Interim Status 2 (1980).

This policy is not only unconstitutional, it is unwise. This case presents the Court with an opportunity to protect juveniles from needless loss of liberty while eliminating an abusive practice which has contributed directly to the failures of juvenile justice noted often by this Court. As in Breed, affirmance "will aid the objectives of th[e] system." 421 U.S. at 540.

In Gault, this Court focused particularly on the singular inability of juvenile courts to control recidivism. 387 U.S. at 21-22. The practices challenged in this case contribute mightily to those failures. As the California Supreme Court stated:

> Locking up children charged with or suspected of offenses, before adjudication, probably does more to contribute to the army of habitual criminals than any other procedure in what is called the juvenile justice system.

In re William M., 3 Cal.3d 16, 31, n.25; 89 Cal.Rptr. 33, 43, n.25(1970). Juvenile courts are far more likely to improve their record by eliminating the power to detain at will upon arrest.[60]

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[60]"Many judges sincerely believe that detention has therapeutic value and that confinement serves as a deterrent to further delinquency.... On the contrary we conclude that there is no value in detention as a deterrent to delinquency. The child who will be deterred by a stay in detention is the same child who is affected positively by his court appearances before the judge. In other words, the impact of the court as as institution representing the law will have the effect sought by detention if the child is amenable to treatment and supervision in his own home."
Whitlatch, Practical Aspects of Reducing Detention Home Population, 24 Juv. Justice 17, 22 (1973).

1. There Are No Benefits to Juveniles Which Justify Unnecessary Detention

This Court has frequently recognized the significant interests juveniles possess to remain free from unlawful or wrongful deprivations of liberty. See In re Gault, 387 U.S. at 27, 29, 36-37, 50; In re Winship, 397 U.S. at 365-66; Breed v. Jones, 421 U.S. at 529. Once detained, detainees are subject to many indignities incident to detention. Bell v. Wolfish, 441 U.S. 520 (1979).

The record in this case conclusively demonstrates that there are no special benefits to juveniles in detention in New York to justify an otherwise unconstitutional process. Cf. McKeiver v. Pennsylvania, supra. To the contrary, incarceration can be a devastating personal experience, involving a traumatic removal from one's family,

school and community. (J.A. 232). See pp. 30-32, supra.

The record clearly shows that pre-trial detention can be seriously harmful to juveniles:

> Juveniles detained under [former F.C.A. §] 739(a)(ii) may be held in a secure facility and exposed to assault and criminal subcultures.

(J.A. 107).[Footnote omitted].

Moreover, wrongful incarceration is likely to contribute to future delinquent or criminal conduct:

> Official action may actually help to perpetuate delinquency in the child through a process in which the individual begins to think of himself as delinquent and organizes this behavior accordingly. The process is further reinforced by the effect of the labeling upon the child's family, neighbors, teachers, and peers, whose reactions communicate to the chld in subtle ways a kind of expectation of delinquent conduct. The undesirable consequences of official treatment are maximized in programs that rely on institutionalizing the child.

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Challenges of Crime in a Free Society 80 (1967).[61]

The potentially traumatic impact of incarceration is all the more real given the conditions of confinement to which juveniles are subjected in New York. As the former New York City Deputy Mayor for Criminal Justice, Herbert Sturz, put it in 1976: "Spofford is in many ways indistinguishable from a prison." (PX 30, p.6). The restrictive conditions in secure detention have already been set forth at pp. 33-34, supra.

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[61] See also In re William M., 3 Cal. 3d at 31 n.25, 89 Cal.Rptr. at 43, n.25 (1970): "The experience tells the youngster that he is "no good" and that society has rejected him. So he responds to society's expectation, sees himself as a delinquent, and acts like one."

2. Detention Adversely Affects the Court Proceedings

Detention prevents the juvenile from locating witnesses who are only known to him (J.A. 131-133). With the accused in detention, counsel must do all the trial preparation, investigation, and witness preparation himself. See Miller, Preventive Detention - A Guide to the Eradication of Individual Rights, 16 Howard L.J. 1, 15 (1970).[62]

Additionally, pre-trial detention may have an adverse effect on the fact-finding process itself. The trial judge is the sole finder of fact and is always aware that a juvenile has been in deten-

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[62] See also, Bitter v. United States, 389 U.S. 15, 16 (1976); Barker v. Wingo, 407 U.S. 514, 533 (1972); Stack v. Boyle, 342 U.S. 1, 8 (1951); Kinney v. Lenon, 425 F.2d 209, 210 (9th Cir. 1970); Ares, Rankin & Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 38 N.Y.U.L. Rev. 67, 84-86 (1963); Rankin, The Effect of Pretrial Detention; 39 N.Y.U.L. Rev. 641 (1964).

tion. Accordingly, the chances are good that the judge will be prejudiced by knowing that something in the child's background led another judge to order the detention (J.A. 131). See also, Preventive Detention: An Empirical Analysis, 6 Harv.Civ.Rts./Civ.Lib.L.Rev. 289, 347 (1971).

Finally, the disposition of the case may be influenced by detention because sentences are based on the juvenile's amenability to treatment or supervision in the community. In New York, for example, no sentence may be imposed without judicial inquiry into the particular background of the individual. F.C.A. § 352.2(2); In re Nicholas W., 45 A.D.2d 850, 358 N.Y.S.2d 493 (2d Dept. 1974). Confinement before trial prevents the juvenile from demonstrating a capacity to remain in his home setting

(J.A. 133-134). As one commentator put it:

> It is unquestionably true that the child with an apparently stable living arrangement, a job or school enrollment, and other indices of respectability will do wonders in altering the judge's perspective as to proper disposition.

(SX F, p.80, n.40).[63]

For all of these reasons, "the danger of too much detention before trial or disposition currently outweighs the danger -- both for juveniles and society -- of too much release." Standards Relating to Interim Status at 3.

B. Even Without § 320.5(3)(b) New York Has Ample Power to Protect the Public From Criminally Prone Juveniles

Amici 23 States have suggested (Brief, p.1) that "the elimination of

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[63]The record in this case strongly supports these contentions. As the Vera Institute study shows, in all of the cases which resulted in a placement outside of the juvenile's home, 86.4% involved juveniles who were detained pre-trial. (PX 44, p.2).

preventive detention would put the juvenile justice system in grave risk of extinction by seriously eroding public support for its separate existence." This argument is totally unsupported and unsupportable. It is also an inappropriate argument to make to this Court, since it completely mis-applies the reasoning in McKeiver v. Pennsylvania, 403 U.S. at 540, that certain kinds of procedural safeguards may be withheld from the juvenile justice system because including them would "interfere" too greatly with its operation and "might well destroy the traditional character" of the system. This Court has never embraced a jurisprudence which blinks at constitutional defects because the public insists upon keeping them.

Moreover, the argument is hyperbolical in its own terms. The public simply is not threatened by an affir-

mance in this case. New York retains an enormous capability to detain juveniles upon arrest. New York may detain, without bail,[64] all juveniles who are found by the court to be likely not to return. Appellees do not challenge this power in any way. This power is much greater than the state possesses for adults accused of crime. When courts conclude that adults are at risk not to return, bail may be imposed, provided it is not excessive. New York Criminal Procedure Law § 510.30; 18 U.S.C. § 3146. For juveniles, the power to detain is unfettered once such a finding is made.

Preventive detention is not what nourishes the system and it is certainly

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[64]The power to detain juveniles in New York without bail is not challenged in this case. All parties agree that such detention is wholly beyond the issues raised in this case.

not what justifies its separate existence. In fact, New York embarked on a course away from juvenile court for those under 16 years old in 1978, three years before the district court opinion in this case. By enacting the Juvenile Offender Law and subjecting 13, 14 and 15 year olds to criminal court jurisdiction in specified cases, New York ironically has exempted these more serious offenders from the reach of preventive detention. At the very least, this proves that preventive detention is not a necessary feature of New York's juvenile justice system, without which the public safety would be jeopardized.

POINT III

THE STATUTORY SCHEME IMPOSES PUNISHMENT BEFORE TRIAL IN VIOLATION OF THE CONSTITUTION.

Although ruling that pre-trial confinement to assure an accused's presence

at trial is a valid non-punitive purpose, Bell v. Wolfish, 441 U.S. at 538-41, this Court recognized that the purpose for confinement is critical in determining the constitutionality of any deprivation of liberty.

In this case, it is undisputed that the express legislative purpose of F.C.A. § 320.5(3)(b) is "crime prevention" (Brief for Appellant Schall, pp.23-25; J.A. 67,104-105,114). This is an important, limiting feature of this case which distinguishes it from most other juvenile detention statutes.[65]

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[65]A careful examination of the statutes, as described in Appendix A of the Brief Amicus Curiae submitted on behalf of 23 states reveals that all but three states expressly authorize detention to protect the child in addition to protecting the community. Only Florida, Louisiana and Michigan, like New York, authorize detention solely to protect the community. As Judge Newman noted, this case does not address whether protection of the child constitutes a legitimate alternative purpose to punishment in those statutes which permit it. (J.A. 120).

An important constitutional question, which need not be decided in this case, (See Point I, supra, at 50-54) is whether this asserted community protection purpose is permissible as a basis for detention. The Court of Appeals expressly did not reach this issue. (J.A. 111).[66] The broader question was unnecessary to the panel's decision because, the court concluded that, in actuality, the statute "is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts."[67] (J.A. 111). (See also Judge

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[66]Because the Court of Appeals did not reach this issue, vacation and remand, rather than reversal, may be more appropriate if the Court disagrees with the holding being reviewed.

[67]This precise holding would apply even if, consistent with many other states, section 320.5(3)(b) had been enacted to protect juveniles.

Newman's concurring opinion at J.A. 117, n.1).

The panel's conclusion that §320.5(3)(b) remands are in actuality imposed as punishment derived from its findings that: (1) a large number of juveniles were detained who were ultimately never adjudicated delinquent; (2) many juveniles detained were mistakenly deemed to be dangerous but upon adjudication were released to the community; and (3) many juveniles detained were released upon disposition because "the time served, including the preventive detention period, is frequently considered sufficient punishment." (J.A. 111-112). The court found no compelling interest to justify detention as to any of these groups. Even in the absence of these findings, this statute would be unconstitutional.

A. Punishment Before Trial Is Constitutionally Proscribed

Punishment before trial is antithetical to American constitutional law. It is a truism that in the United States every criminal justice system includes a "trial which the United States Constitution guarantees to any accused before he may be punished." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). Whether punishment inflicted by the state occurs in the criminal context or in any other context:

> [T]he state does not acquire the power to punish...until after it has acquired a formal adjudication of guilt in accordance with due process of law.

Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977).[68]

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[68]See also Bell v. Wolfish, 441 U.S. at 535; Gregory v. Chicago, 394 U.S. 111, 112 (1969) Thompson v. City of Louisville, 362 U.S. 199 (1960); Speiser v. Randall, 357 U.S. at 525-36.

Under our constitution all persons (juveniles as well as adults) are cloaked with a presumption of innocence. Enforcement of that presumption "lies at the foundation of the administration of our criminal law." In re Winship, 397 U.S. at 363.[69] As this Court has previously recognized, among the reasons an accused enjoys a right to freedom before conviction is that it "prevent(s) the infliction of punishment prior to conviction." Stack v. Boyle,

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[69]Although this Court has ruled that the presumption of innocence "has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun," Bell v. Wolfish, 441 U.S. at 533 (emphasis supplied), this conclusion has no relevance to the issues in this case. Wolfish was limited solely to what conditions government may impose on detainees once they are properly detained. Moreover, "[t]he only justification for pre-trial detention, asserted by the Government is to ensure the detainees' presence at trial." 441 U.S. at 534, n.15. Accordingly Wolfish provided "no occasion to consider whether any other governmental objectives may constitutionally justify pre-trial detention." Id.

342 U.S.1, 4 (1951).[70] See also Bell v. Wolfish, 441 U.S. at 582 (Stevens & Brennan, J.J., dissenting):

> [P]rior to conviction every individual is entitled to the benefit of a presumption both that he is innocent of prior criminal conduct and that he has no present intention to commit any offense in the immediate future.

As recently stated by the Court of Appeals for the Eighth Circuit:

> No one can deny society's continuing concern for preventing the occurrence of such offenses and exercising every legitimate effort to punish those who commit the crime. But punishment for any crime before trial and proper conviction is alien to our legal system and constitutes a denial of due process.

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[70] A clue to the Framers' understanding that the loss of pre-trial liberty is punitive may be found in the fact that the prohibition against excessive bail language and the prohibition against cruel and unusual punishment are contained in the same sentence in the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

Hunt v. Roth, 648 F.2d 1148, 1162-63 (8th Cir. 1981); vacated and remanded as moot sub nom. Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam).

To determine if a particular government act constitutes punishment, this Court has instructed that one must inquire into, inter alia:

> whether its operation will promote the traditional aims of punishment -retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).[71]

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[71]H.L.A. Hart characterized legal punishment in the following terms:

> (i) It must involve pain or other consequences normally considered unpleasant.
> (ii) It must be for an offense against legal rules.
> (iii) It must be of an actual or supposed offender for his offense.
> (iv) It must be intentionally administered by human beings other than the offender.

Under this test, the challenged scheme must be regarded as constituting punishment in the constitutional sense. This Court has recognized that punishment in modern society serves several purposes:

> It would be archaic to limit the definition of 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent - and preventative. One of the reasons society imprisons those convicted of crime is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

United States v. Brown, 381 U.S. 437, 458 (1965). See also McGinnis v. Royster, 410 U.S. 263, 273 (1973).

(footnote continued)

> (v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

H. Hart, "Prolegomenon to the Principles of Punishment," in Punishment and Responsibility 4-5 (1968).

The district court correctly observed that:

> (t)he state cannot escape the obviously punitive nature of detention under [former F.C.A.] § 739 by labeling the statute preventive and 'regulatory,' since 'even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute.

(J.A. 90-91). The actions of the state in detaining juveniles before trial "is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm." Specht v. Patterson, 386 U.S. 605, 609 (1967). See also Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 477 n.40 (1977).

Detention for the protection of society, based on a prediction that, if released, the accused would commit a crime, is a classic form of prevention and deterrence, and a valid form of punishment after trial. H. Packer, The

Limits of the Criminal Sanction, (1968). In fact, deterrence may only be utilized punitively. "Retribution and deterrence are not legitimate nonpunitive government objectives." Bell v. Wolfish, 441 U.S. at 539 n.20.

There is a constitutionally significant difference between detention before trial in order to ensure one's presence in the future and detention because of a judicial finding that one is dangerous to society. Finding that an individual is more likely than not to commit a crime if not jailed stigmatizes the individual. (J.A. 88). See Breed v. Jones, 421 U.S. at 529. Detention to prevent crime is inextricably connected with a final goal of any criminal justice system. By contrast, detention to assure completion of the trial process serves no sentencing value; it simply furthers society's independent

interest that the trial process take place with the accused's presence.[72]

Punishment based upon the unproven assumption that someone has done something wrong in the past offends the essentials of due process. As the district court noted:

> If incarceration under the statute were based exclusively on a founded suspicion that the juvenile had committed crimes, no one would doubt that this constituted punishment.
>
> To hold that it is not "punishment" when based on a vague suspicion that the juvenile may commit future crimes would render the applicability of the due process clause in inverse proportion to the arbitrariness of governmental decision-making.

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[72]Detaining an accused in order to assure the integrity of the fact-finding process is a deprivation of liberty to which all citizens are subject. Thus, witnesses are frequently held in "protective custody" or otherwise detained pending a trial, when deemed necessary by the government. See Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 U. Va. L. Rev. 371, 404 (1970).

(J.A. 91)[73]

Preventive detention is imposed for a prior offense in the sense that arrest for a crime is a pre-condition to the imposition of the detention. Such detention is not merely "regulatory" and forward looking; upon acquittal the juvenile must be released from detention. See Guggenheim, Paternalism, Prevention and Punishment: Pretrial Detention of Juveniles, 52 N.Y.U.L. Rev. 1064, 1091 (1977). Neither the unaccused individual nor the person acquitted of the crime may be detained because he poses a risk to society. Similarly, the Constitution does not allow a license to detain preventively the presumptively innocent arrestee.

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[73] See also Note, Toward a Constitutional Definition of Punishment, 80 Colum.L.Rev. 1667,1681(1980).

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
October 12, 1983

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IN THE

Supreme Court of the United States

October Term, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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A. Pretrial Detention under New York Family Court Act § 320.5(3)(b) Is Not Unconstitutional Punishment.

Appellees ask the Court to invalidate New York Family Court Act ("FCA" or "the Act") § 320.5(3)(b) under the due process clause of the Fourteenth Amendment on the theory that detention to prevent pretrial crime is punishment without trial. Brief for Appellees ("appellees' brief" or "brief") at 94-106. The theory is drawn from *Bell* v. *Wolfish*, 441 U.S. 520, 535-40 (1979), and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 167-70 (1963), and has no application in the case at bar. Properly invoked, the theory distinguishes between post-detention sanctions that are regulatory and can be implemented directly and post-detention sanctions that are punitive and require prior hearings. *Bell* v. *Wolfish*, *supra*; *Kennedy* v. *Mendoza-Martinez*, *supra*. It has no relevance in deciding if pretrial detention based on probable cause and a prior detention hearing is itself justified, the purpose for which appellees offer it. *See Bell* v. *Wolfish*, *supra*, at 533-35, 536-37 (1979); *id.* at 569 (*Marshall*, J. dissenting); *id.* at 581-84 (*Stevens*, J. dissenting).

Appellees' principal argument under their unconstitutional punishment theory (brief at 94-96, 98-106) depends on a distinction between detention under FCA § 320.5(3)(a) to assure appearance at trial, which they accept as permissible, or regulatory, under *Wolfish* and *Mendoza-Martinez*, and detention under § 320.5(3)(b) to prevent pretrial crime, which they reject as impermissible or punitive. *Compare* appellees' brief at 93 n.64 and accompanying text, 94-95 *with id.* at 101-106. The distinction is said to rest on differences between the two statutory detention standards which are constitutionally significant under *Wolfish* and *Mendoza-Martinez*. Appellees' brief at 95, 102-106. On examination, the asserted differences—in statutory purpose (brief at 95-96), relationship to the juvenile justice system (brief at 102-106) and effect on detained juveniles (brief at 104, 106)—are either non-existent or not significant. Accordingly, none supports the opposing characterizations and due process

outcomes appellees assign to § 320.5(3)(a) and § 320.5 (3)(b).

Disregarding the Court's advice that all seven factors listed in *Bell* v. *Wolfish*, 441 U.S. at 537-38, and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168-69, be considered (*id.* at 169), appellees select three to illustrate the alleged significant differences between detention under FCA § 320.5(3)(b) and detention under § 320.5(3)(a), the subsection they concede is regulatory—whether the sanction, here pretrial detention under § 320.5(3)(b) in contrast to § 320.5(3)(a), promotes the traditional aims of punishment, retribution and deterrence; whether it applies to behavior that is already a crime; and whether it is rationally related to an alternative, non-punitive purpose. Appellees' brief at 101. Considering § 320.5(3)(a) and § 320.5(3)(b) under the three factors perforce discloses their different purposes. It also discloses that the crime prevention purpose of pretrial detention under § 320.5(3)(b), like the purpose of pretrial detention under § 320.5(3)(a), is alternative or non-punitive, that detention under § 320.5(3)(b) is no more an adjudication of pending criminal charges than detention under § 320.5(3)(a), that detention under § 320.5(3)(b) does not promote the traditional aims of post-trial punishment, or, more properly in the juvenile justice system in New York, post-adjudication dispositions for "supervision, treatment or confinement" (§§ 301.2[7], 352.1[1]) and that § 320.5(3)(b) stands in exactly the same relation to those aims as its concededly regulatory counterpart, § 320.5(3)(a).

A sanction involving an affirmative restraint on liberty has an alternative purpose if it is reasonably related to a legitimate governmental objective other than punishment. *Bell* v. *Wolfish*, 441 U.S. at 538-39; *United States* v. *Edwards*, 430 A.2d 1321, 1332 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982). If the sanction's quality as punishment remains in doubt after its legitimate governmental objective is established, it may be reviewed to determine if it is "backward-looking, personal, and norma-

tive" and thus punishment, or "forward looking, general, and nonnormative" and thus alternative or non-punitive. *Bell* v. *Wolfish*, *supra*, at 581 n.10 (*Stevens*, J. dissenting); *United States* v. *Edwards*, *supra*, at 1332 n.29, and accompanying text. *Edwards*, *supra*, at 1332, examined the District of Columbia's adult preventive detention statute in light of these considerations and held its crime prevention purpose to be alternative or non-punitive. Preventing pretrial crime was accepted as a legitimate governmental objective in itself, and, under the other considerations, pretrial detention to prevent crime was indistinguishable from pretrial detention to assure appearance at trial. *Id.* The same results obtain from an examination of detention under FCA § 320.5(3)(b), both in terms of the governmental objectives involved in the standard and in comparison with detention under §320.5(3)(a) in light of the other considerations.

Appellees accept (brief at 95) prevention of pretrial crime as the purpose of detention under FCA § 320.5(3)(b), albeit mistakenly identifying it as an "express legislative purpose" (*id.*) when it simply appears from text.* They also accept the prevention of pretrial crime as permissible *arguendo* under the due process clause (brief at 56), acknowledge that New York's express community protection interest in § 320.5(3)(b) (*see* p. 3 n.*) was established below (brief at 25) and accept that interest as substantial, at least for some crimes (*see* pp. 12-17). Appellees' brief at 56.** Intervenor fairly assumes that appellees also accept

* New York has two express legislative purposes in FCA § 320.5 (3)(a) and § 320.5(3)(b) and in the other sections of the Act: the "needs and best interests" of the juvenile and the "need for protection of the community." § 301.1 *See* brief for Intervenor-Appellant ("intervenor's brief") at 7, 32-39.

** Appellees put their plea for a "candid appraisal" of FCA § 320.5 (3)(b) (brief at 77) aside when they claim that New York's child protective, and presumptively legitimate, purpose in the statute is not present. *See* appellees' brief at 20, 25, 56, 95. The New York Court of Appeals described the state's child protective purpose as "benefit of the juvenile" in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39

(footnote continued on next page)

the statute's crime prevention purpose, as well as the state's underlying community and child protective interests in it (*see* p. 3 n.*), as establishing a legitimate governmental

N.Y.2d 682, 687 (1976), and held it applicable to detention under § 320.5(3)(b) when it upheld the statute. The purpose was codified for all sections of the Act shortly after the *Wayburn* decision as "needs and best interests" of the juvenile (along with "need for protection of the community"). *See* § 301.1 and intervenor's brief at 7 n.*. *Contrast* appellees' brief at 20, stating that the consideration of the "needs and best interests" of the juvenile is limited to the post-adjudication disposition sections of the Act. Indeed, the district court in this case relied on the child protective purpose involved in § 320.5(3)(b) to uphold the statute under the equal protection clause. A. 63-68.

In further contrast to appellees' claim, the testimony of Judge Quinones they cite (brief at 26) discloses a specific child protective concern about the juvenile's future criminal behavior, albeit one that is less weighty than the community's concern about pretrial juvenile crime. The juvenile, if detained under § 320.5(3)(b), is kept free of crime and the risks incident to that behavior (A. 269; *see also* A. 317-18 [Driscoll]), matters within his needs and best interests. Thus, to the extent the passage appellees cite in the majority opinion below (brief at 20) states that detention decisions under § 320.5(3)(b) "emphasize" the state's community protection purpose over its child protective purpose (A. 104), it is in accord with the testimony of Judge Quinones and unobjectionable. To the extent the passage states (A. 105) that the "criteria" for detention decisions under § 320.5(3)(b) "do not include the interests of the child," it is correct if "criteria" refer to considerations Family Court Judges generally apply in deciding whether there are "facts and reasons" (*id.*) warranting detention and again, unobjectionable. *See* Brief for Appellant Schall ("appellant's brief") at 36-38; intervenor's brief at 9, 43-44; appellees' brief at 20, 21 n.19. If, however, the passage means that Family Court Judges make detention decisions without regard to the state's child protective purpose in § 320.5(3)(b), it must be rejected as inconsistent with Judge Quinones' testimony and the legislative purpose of the Act expressed in § 301.1. *See Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979).

Given that New York's community and child protective interests in FCA § 320.5(3)(b) are restricted to its crime prevention purpose and were specifically so acknowledged by Judge Quinones (A. 269-70; *see also* A. 270, statute not to be invoked for broader "benefit," *e.g.*, to shock or reform the juvenile or to provide him with social or therapeutic services, A. 268) as well as elsewhere in the record (*see* intervenor's brief at 8 n.*), appellees are obliged to give it the deference they say is due juvenile justice standards that are not masked by facially benign labels-of-convenience. Appellees' brief at 75-77. Notwithstanding this deference to candor, appellees argue elsewhere (brief at 86-88, 95 n.65) that if § 320.5(3)(b) served more generalized child protective purposes, *i.e.*, it was not specifically crime-related, its likelihood of surviving due process scrutiny would be enhanced.

objective which is distinct from punishment.* In any event, case law authority upholds both adult and juvenile preventive detention under the due process clause, and, as appellees concede, every American jurisdiction uses juvenile preventive detention. *United States* v. *Edwards*, 430 A.2d at 1331-33; *Parker* v. *Roth*, 202 Neb. 850, 278 N.W.2d 106, 117, *cert. denied* 444 U.S. 920 (1979); *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682, 689-90 (1976) (statute involved in case at bar). *See* appellant's brief at 23-24; Brief for Intervenor-Appellant ("intrevenor's brief") at 32-39.

An examination of FCA § 320.5(3)(b) in light of the other considerations that may be relevant in determining whether a restraint on liberty has an alternative or nonpunitive purpose (*see* pp. 2-3) discloses that detention under the statute is indistinguishable from detention under § 320.5(3)(a), its concededly regulatory counterpart. Both detention to prevent pretrial crime under § 320.5(3)(b) and

* Appellees do not argue at any point that preventing juvenile pretrial crime is an illegitimate governmental objective or punitive in itself. Instead, they advise the Court that it need not decide the issue (brief at 47, 50, 53, 60, 95-96) and, alternatively, suggest remand if the issue is reached because it was not decided by the Court of Appeals. Appellees' brief at 96 n.66.

Remand is unwarranted given the question of law involved was decided by the district court under the equal protection clause (A. 63-68), is included in the questions presented (*see* Jurisdictional Statement for Appellant Schall at i; Jurisdictional Statement for Intervenor-Appellant at i [question 1]) and considered in the opening briefs for appellant (at 17-18, 23-24) and intervenor (at 32-39). Nor will remand illumine the Court's consideration of the issue. The opinions of several courts of appeals, cited throughout the briefs for appellant and intervenor, provide guidance, and the construction of material sections of the Act is not in doubt.

Appellees' failure to establish that preventing juvenile pretrial crime is an illegitimate governmental objective or punitive in itself is fatal to their unconstitutional punishment argument for two reasons. First, absent other evidence of punitive intent or effect, the penal or regulatory character of restraints on liberty is determined in the nature of the relation to the governmental interests they involve. *Bell* v. *Wolfish*, 441 U.S. at 538. Second, the other evidence appellees offer with respect to FCA § 320.5(3)(b) does not distinguish the statute from its concededly regulatory counterpart, § 320.5(3)(a). It proves instead that both statutes are the same and, perforce, that § 320.5(3)(b) is regulatory. *See* pp. 5-6.

detention to assure appearance at trial under § 320.5(3)(a) incapacitate the juvenile to avoid reasonably predictable future conduct, and are equally "forward looking" for this reason. *United States* v. *Edwards*, 430 A.2d at 1332. Both detention standards are prospective in their community and child protection purposes. *See* p. 3 n.*, p. 3, n.**. For these reasons, both standards are equally "general and nonnormative." *Bell* v. *Wolfish*, 441 U.S. at 581 n.10 (*Stevens*, J. dissenting); *see* also *United States* v. *Edwards*, *supra* at 1332 n.29. Detention to prevent pretrial crime does not determine guilt or prescribe punishment. *United States* v. *Edwards*, *supra*, at 1332. Accordingly, a detention order under § 320.5(3)(b), like an order under § 320.5(3)(a), is "not backward-looking, personal, and normative." *Bell* v. *Wolfish*, *supra*; *United States* v. *Edwards*, *supra*, at 1332 n.29.

A comparison between pretrial detention under FCA § 320.5(3)(a) and § 320.5(3)(b) in relation to the second factor appellees select (brief at 101) from the *Wolfish* and *Mendoza-Martinez* list—whether the sanction applies to behavior that is already a crime—shows that the status of the criminal charge against the juvenile is exactly the same when detention under either standard is considered. Conditional and unconditional release and pretrial detention under § 320.5(3)(a) and § 320.5(3)(b) are considered at an accused delinquent's initial appearance in Family Court. *See* appellant's brief at 12; intervenor's brief at 2-6. Initial appearance follows arrest and the filing of a delinquency petition. *See* intervenor's brief at 2-3. By statute, the petition must be verified, charge at least one crime, and allege facts supporting each element of the crime(s) charged and of the juvenile's commission of them. § 311.1(2), (3)(e), (h), (4). The facts must be sworn to by individuals with personal knowledge of the events and "provide reasonable," or probable, "cause to believe" that the juvenile "committed the crime or crimes charged." § 311.2(2). Accordingly, if the need for pretrial detention

is considered at initial appearance, the status of the criminal charge against him is the same for purposes of both § 320.5(3)(a) and § 320.5(3)(b), arrest and probable cause petition.* *Contrast* appellees' brief at 105, 106, characterizing pretrial detention under § 320.5(3)(b) as more punitive than pretrial detention under § 320.5(3)(a) based on two inconsistent and equally false contentions: first, that detention under § 320.5(3)(b), but not under § 320.5(3)(a), means that the juvenile has done "something wrong in the past"; and second, that detention under § 320.5(3)(b), but not § 320.5(3)(a), is imposed for a "prior offense . . . in that arrest for a crime is a precondition". Appellees' further contention (brief at 104) that detention under § 320.5(3)(b), but not under § 320.5(3)(a), "stigmatizes" the juvenile because it rests on a finding that he is more likely than not to commit a pretrial crime is also false. Detention under § 320.5(3)(a) also rests on a finding that the juvenile is more likely than not to commit a pretrial crime, namely bail-jumping. New York Penal Law §§ 215.55-215.57 (includes release on recognizance).

A consideration of pretrial detention under FCA § 320.5(3)(b) in relation to the third factor appellees select (brief at 101) from the *Wolfish* and *Mendoza-Martinez* list—whether the sanction promotes the traditional aims of punishment, retribution and deterrence—shows that there are significant differences between detention under § 320.5

* The terms "probable cause petition" or "petition providing probable cause," used by intervenor throughout, incorporate two express state law requirements: first, that delinquency petitions "provide reasonable cause to believe" that a crime has been committed and that the juvenile named in the petition committed it (FCA § 311.2[2]; *see* § 311.1[2], [3][e], [h], setting forth requirements for specificity of allegations); and second, that the facts alleged to provide the required reasonable cause be "non-hearsay." § 311.2(3). The term "non-hearsay" means sworn statements made on personal knowledge. § 311.2; New York Criminal Procedure Law ("CPL") § 100.40(1). Judge Quinones illustrated the use of the non-hearsay rule when he said he would not require a complaining witness to testify at initial appearance but, instead, would require the witness to sign, *i.e.*, swear to, the petition (or a supporting deposition), if he had not already done so. *See* appellees' brief at 18 n.16.

(3)(b) and, for example, post-adjudication placement, which foreclose a punitive characterzation of the statute. A comparison between pretrial detention under § 320.5(3)(a) and § 320.5(3)(b) in relation to the aims of punishment shows again that § 320.5(3)(b) is indistinguishable from its regulatory counterpart.

As appellees observe (brief at 102-104), pretrial detention under § 320.5(3)(b) and post-trial punishment, for example, a dispositional placement for "supervision, treatment or [and] confinement" (§§ 301.2[7], 352.1[1]; *see* intervenor's brief at 13-15), share a means and an aim. The aim is deterrence of future crime, and the means is confinement, or incapacitation, of the juvenile. In contrast to the conclusions appellees draw, this seeming coincidence does not establish that detention under § 320.5(3)(b) is punitive in itself. *Edwards, supra,* at 1332-33, examined preventive detention and post-trial punishment in terms of confinement and deterrence when it upheld the District of Columbia statute and found the coincidence in means and aim to be only partial and the comparison itself, inaccurate. The same results obtain on examination of detention under § 320.5(3)(b) and post-adjudication disposition.

Under § 320.5(3)(b), as under the District of Columbia statute, deterrence of future crime is confined to the detainee and does not serve its post-adjudication role as an example to others. *United States* v. *Edwards,* 430 A.2d at 1333. Equally, under § 320.5(3)(b), as under the District's statute, confinement is for the brief pretrial period, a maximum of seventeen days (absent extraordinary circumstances) in New York, and ninety days in the District of Columbia, not for the lengthy terms associated with post-trial adult sentences and post-adjudication juvenile placements. *United States* v. *Edwards, supra. See* intervenor's brief at 14 n.* & n.**. Most significantly, *Edwards, supra,* observes that punishment has a rehabilitation aim which preventive detention lacks and could not properly include since guilt has not been determined. *United States* v. *Edwards, supra,* at 1333 & n.31. *See Ingraham* v. *Wright,* 430

U.S. 651, 686-87 (1977) (*White*, J. dissenting); *McGinnis* v. *Royster*, 410 U.S. 263, 273 (1973). Since as *Edwards*, *supra*, at 1333, observes further, the confinement/deterrence comparison does not consider this significant difference between preventive detention and post-trial punishment, it is incomplete and cannot support the conclusion that preventive detention is punitive under the *Wolfish* and *Mendoza-Martinez* aims of punishment factor.

Pretrial detention under FCA § 320.5(3)(b), like preventive detention under the District of Columbia statute, has no prospective rehabilitative component. *See* pp. 8-9.* However, post-adjudication dispositions, especially placements for a term with local commissioners of social services and the state Division for Youth, are specifically rehabilitative and nonretributive. Executive Law §§ 511-a(2). *Matter of Quinton A.*, 49 N.Y.2d 328, 334 (1980). Accordingly, the difference *Edwards* cites as significant in finding the District of Columbia statute regulatory rather than punitive is enhanced with respect to § 320.5(3)(b) since adult sentencing is generally less rehabilitative and is retributive, and § 320.5(3)(b) is entitled to greater deference under the aims of punishment factor than the District of Columbia statute received.

Notably, the aims of punishment argument appellees offer against detention under FCA § 320.5(3)(b) is not the

* Detained juveniles receive protective care, including education, recreation and counseling services in the least restrictive environment consistent with their social adjustment. *See* intervenor's brief at 10-11. There are approximately 950 detention beds in the state, approximately 550 nonsecure and approximately 395 secure. A. 159 (Bigley). Jail placements, separate from the adult population of the facility, are allowed only with the permission of the Division for Youth, and then for only 2 renewable 24 hour periods. 9 New York Codes, Rules and Regulations ("NYCRR") § 180.6. Detained juveniles are allowed emergency home visits (9 NYCRR § 180.9[c][5]), and nonsecurely detained juveniles may obtain 2 day passes, to assist in the preparation of their cases or for other appropriate reasons. Securely detained juveniles may apply to the court for release, for example, to assist in the preparation of their cases.

The average length of stay for juvenile delinquents in secure detention is 12.2 days, and 21.9 days in nonsecure detention. A. 161 (Bigley).

one they were required to make. Given their concession that detention under § 320.5(3)(a) is regulatory, they were obliged to show that detention to prevent pretrial crime under § 320.5(3)(b) promotes the aims of punishment in some way that detention to assure appearance at trial under § 320.5(3)(a) does not. They offer but two contentions on the point (brief at 104-105): first, that detention under § 320.5(3)(b) has a sentencing value whereas detention under § 320.5(3)(a) does not; and second, that detention under § 320.5(3)(b) is related to the "final goal" of the juvenile justice system, apparently because it involves a finding that the juvenile "is more likely than not to commit a crime," whereas detention under § 320.5(3)(a) reflects an independent societal interest in the accused's presence at trial. The first contention is false. Neither pretrial detention under § 320.5(3)(a) nor pretrial detention under § 320.5(3)(b) has any sentencing value at disposition. Only post-trial detention does, and then only for restrictive placements and in special circumstances. *See* intervenor's brief at 14n.**. The second contention is also false insofar as it omits consideration of New York's independent and permissible interests in pretrial detention under § 320.5(3)(b) (*see* pp. 3-4; appellant's brief at 23-24; intervenor's brief at 32-39) and assumes that a finding on likelihood of crime is involved only in detention under § 320.5(3)(b). As noted (p. 7), detention under § 320.5(3)(a) includes a finding that the juvenile is likely to commit a crime if released, namely "bail jumping." Indeed, the finding of likelihood of future crime that both detention standards require and their use of pretrial confinement, dissociated from prospective rehabilitation, to deter the behavior demonstrate again that § 320.5(3)(b) is the same as § 320.5(3)(a) in terms of the *Wolfish* and *Mendoza-Martinez* aims of punishment factor and perforce regulatory.

The four *Kennedy* and *Mendoza-Martinez* factors which appellees exclude from consideration are: whether the sanction involves an affirmative disability or restraint; whether

it has been regarded as punishment historically; whether it is applied after a finding of *scienter;* and whether it is excessive in relation to its alternative, non-punitive purpose. *Bell* v. *Wolfish*, 441 U.S. at 537-38; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168-69. When the four factors are applied to FCA § 320.5(3)(a) and § 320.5(3)(b), the same results obtain for both detention standards. For example, detention under both § 320.5(3)(a) and § 320.5(3)(b) involves an affirmative restraint on liberty. The purposes of detention under § 320.5(3)(a) and § 320.5(3)(b), appearance at trial and prevention of pretrial crime respectively, are not now, and have not been, regarded as punishment under the due process clause. *Compare Bell* v. *Wolfish, supra*, at 533-35, 536-37; *id.* at 569 (*Marshall*, J. dissenting); *id.* at 581-84 (*Stevens*, J. dissenting) (pretrial detention to assure appearance not regarded as punishment), *with United States* v. *Edwards*, 430 A.2d at 1332; *Parker* v. *Roth*, 278 N.W.2d at 117; *Huihui* v. *Shimoda*, 64 Ha. 527, 644 P.2d 968, 977-78 (1982); *Blunt* v. *United States*, 322 A.2d 579, 584 (D.C. App. 1974) (pretrial detention to prevent crime not regarded as punishment). Neither detention standard involves a finding of *scienter*, and neither is excessive in relation to its alternative purpose. Both permit a juvenile to be confined before trial, a period exactly coextensive with their purposes, and both have exactly the same impact on a juvenile's interests in pretrial liberty.*

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* Intervenor notes, in addition, that pretrial detention to prevent crime is not punishment under the Eighth Amendment. *Contrast* appellees' brief at 100 n.70. The cruel and unusual punishment clause is not applicable to pretrial detention, *Parker* v. *Roth*, 278 N.W.2d at 117, and the excessive bail clause does not require that all crimes or particular crimes be considered bailable. *United States* v. *Edwards*, 430 A.2d at 1325-31; *Parker* v. *Roth, supra*, at 110-13; appellant's brief at 45 n.41; intervenor's brief at 33 n.*; *Brief of Amici Curiae Texas District and County Attorneys Association and The Legal Foundation of America* at 10-12.

B. The Standards and Procedures for Pretrial Detention under New York Family Court Act § 320.5(3)(b) Are Fundamentally Fair.

None of the arguments appellees advance (brief at 50-75) under the three factor test in *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976), serves to invalidate FCA § 320.5 (3)(b). Under their principal argument (brief at 54-62), § 320.5(3)(b) is said to be invalid because it does not automatically exclude a class of crimes, which appellees repeatedly characterize as "petty" or "trivial" (brief at 52, 57, 60, 61) but nowhere define, from the assessment of serious risk of pretrial crime. The argument depends, in turn, on the first and second *Mathews* factors—the governmental and private interests involved in the statute—and appellees' conclusion, after comparing New York's interests in § 320.5 (3)(b) with a juvenile's interest in pretrial liberty, that the juvenile's interest clearly outweighs the state's interest in preventing such crimes. Appellees' brief at 54, 56-57, 60-61, 62.

In response, intervenor submits that the comparison and the conclusion it is alleged to support rest on legally insufficient reasoning. If appellees choose to compare the state's and the juvenile's interests in trivial and non-trivial pretrial crimes under *Mathews*, they are obliged to provide an objective basis for distinguishing between the two classes of crimes which permits the importance of the state's and the juvenile's interests to be assessed and compared. Indeed, without an objective basis for distinction, neither the state nor the juvenile has any ascertainable interest at all. They fail entirely to do so, eschewing a definition of trivial or non-trivial crimes or any other indicia of the crimes they include and exclude. As a result, when they purport to have assessed the importance of the state's and the juvenile's interests in trivial pretrial crimes and conclude that the interest of the juvenile is weightier than that of the state, they, in fact, made no assessment at all and provide the Court with *ipse dixit* instead. The insufficiency of appellees' reasoning is readily demonstrated by reference to their conclusion—appellees claim that trivial crimes must

be excluded from a preventive detention standard to permit it to withstand due process scrutiny, but they cannot say what they are or why they should be excluded.

Appellees' argument that the due process clause requires that some crimes be automatically excluded from preventive detention and their comparison between New York's interests in pretrial detention under FCA §320.5 (3)(b) and a juvenile's interest in pretrial liberty (brief at 54, 56-57, 60-61, 62) are flawed for other reasons as well. First, the argument falsely assumes that qualifying crimes with various labels—"dangerous," "violent," "property," "violent property," or "trivial"—has constitutional significance, that the labels have some uniform meaning and that their use improves detention decision-making, a point refuted by their own witness at the trial below. *See Jones* v. *United States*, —— U.S. ——, 103 S.Ct. 3043, 51 U.S.L.W. 5041, 5044 (June 29, 1983); intervenor's brief at 42-43.

Second, appellees' comparisons between New York's interest in preventive detention under § 320.5(3)(b) and a juvenile's interest in pretrial liberty omit considerations that are relevant to New York's all-crime standard. For example, the state's child protective interest in the statute is omitted from consideration but is, in fact, present, and the juvenile's interest in pretrial liberty is treated as equal to an adult's when it is not either on a direct comparison or in relation to an all-crime standard. *See* p. 3 n.** and intervenor's brief at 32-39.*

* Recent data on juvenile arrests in New York shows that the state's express community and child protective interests in FCA § 320.5(3)(b) and in the other sections of the Act (*see* pp. 3-5 and intervenor's brief at 32-39) are directed to a problem of substantial dimension. Based on the 1980 census, in 1982, there were approximately 1.7 million juveniles, aged 10 through 15, in New York, and they represented 10 percent of the total population. Census Population in Housing, 1980: Summary Tape File 1C, prepared by Bureau of Census, Washington, D.C., 1981. In the same year, juveniles under 16 accounted for 9.7 percent of all arrests for (index) violent crimes, 16.2 percent of all arrests for (index) serious property crimes, and 14.3 percent of all arrests for (index) violent and serious property crimes combined. 1982 New York State Uniform Crime Report: Adult Arrests by Age, Sex and Classification (New York State

(footnote continued on next page)

Third, appellees' failure to establish that the crimes allegedly excluded by the due process clause are non-recidivist crimes and their acceptance of the point established below (*see* intervenor's brief at 42-43)—some juveniles are pretrial recidivists but pose no risk of nonappearance—deprives the community of any pretrial response if juvenile justice standards are to be "candidly apprais[ed]" and applied as appellees insist (brief at 77). It is thus of interest that appellees elsewhere state (brief at 91) that New York should invoke § 320.5(3)(a), permitting pretrial detention to assure appearance at trial, to detain "[c]riminally [p]rone [j]uveniles" before trial.

Last, appellees' failure to state whether the crimes allegedly excluded by due process are predicate crimes, *i.e.*, those charged against the juvenile, or pretrial crimes, *i.e.*, prevented crimes, yields at least two alternative standards. Each relies on untested and inappropriate assumptions, neither improves upon the all-crime standard in § 320.5(3)(b). For example, if appellees are excluding predicate crimes, their apparent theory is that the juvenile who commits trivial crimes will only recidivate with trivial crimes and that 7 to 16 year olds have, and may be relied upon to pursue, crime specialties. If appellees are excluding pretrial crimes, they are requiring the judiciary to predict what crimes the juvenile will not commit, a task far in excess of that imposed by § 320.5(3)(b) and, by force

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Division of Criminal Justice Services); 1982 New York Juvenile Arrests Reported by Age (New York State Division of Criminal Justice Services).

Comparable data for the United States shows that the problem is of substantial dimension nationally as well. In 1982, there were 21.7 million juveniles, aged 10 through 15, in the United States, and they represented 9 percent of the total population. Current Resident Population Reports, Population Estimates and Projections, Series P-25, No. 929, Table 2 (Bureau of Census, May 1983). In the same year, juveniles under 16 accounted for 7.6 percent of all arrests for (index) violent crime, 19.9 percent of all arrests for (index) serious property crime and 17.3 percent of all arrests for (index) violent and serious property crimes combined. *1982 Crime in the United States* 176-77 (United States Department of Justice). (Index crimes are an FBI classification which consists of "violent crimes" defined as murder, non-negligent manslaughter, forcible rape, robbery and aggravated assault and "serious property crimes" defined as burglary, larceny-theft, motor vehicle theft and arson. *Id.*)

of their reasoning in this case, so speculative as to be unconstitutional *per se*.

Appellees' references to three juvenile case histories in the record (brief at 38-39, 57) to show that FCA § 320.5(3)(b) is applied to detain juveniles accused of trivial crimes do not serve that purpose. They do show that the statute is applied consistently with its community and child protective purposes and that each of the juveniles appellees identify posed a serious risk of pretrial crime. Ramos, the juvenile appellees note stole a pair of shorts, broke into the store to do it. He was charged with burglary 3 and related crimes. He was fifteen when he was detained under § 320.5(3)(b) on the allegedly trivial burglary charge, was already on probation as a result of a prior adverse fact-finding for criminal trespass and had seven prior contacts with the Family Court in addition to the criminal trespass finding. *See* plaintiffs' exhibit ("PX") 8a, b.

Dunaway, the juvenile appellees note stole subway-bus transfers, stole them on two separate occasions on the same day. He was charged with petty larceny and a related crime. He was thirteen when he was detained under § 320.5(3)(b), and, in addition, § 320.5(3)(a) (nonappearance) on the petit larceny charge appellees consider trivial. He was already on probation as a result of a prior adverse fact-finding on similar charges. He had threatened the complaining witness and to leave home. His mother informed the court that he came home late and didn't listen to her at all. PX 21a, b.

Parson, the juvenile appellees note was playing "three-card monte," was running the game. He was charged with promoting gambling 2 and a related crime. He was fifteen when he was detained under § 320.5(3)(b) on the gambling charge appellees consider trivial. He had seven prior Family Court contacts and had completed a placement with the Division for Youth. PX 18a, b.

Appellees' two other references to the record (brief at 59 n.45, 59-60 & 60 n.46) are equally unavailing to show that § 320.5(3)(b) is applied to detain juveniles for trivial

crimes, albeit for different reasons. State's exhibits O2, P2, Q2 and R2 display admissions to detention by crime. They combine pre-court admissions (*see* intervenor's brief at 3n.**), court-ordered admissions under § 320.5(3)(a) and § 320.5(3)(b), miscellaneous admission categories, *e.g.*, offending runaways from other jurisdictions held on warrants, as well as pretrial and post-trial admissions. The exhibits provide absolutely no basis for distinguishing among these categories or selecting out the category of interest here, pretrial detention under § 320.5(3)(b). Accordingly, the exhibits can tell nothing about the use of § 320.5(3)(b) to detain for trivial or non-trivial crimes. Appellees' Table V is drawn from these state exhibits and thus does not compare admissions to pretrial detention under § 320.5(3)(b) with the District of Columbia preventive detention statute, it compares all admissions to detention with the statute.

Appellees and intervenor agree that comparisons between the crimes charged in the thirty-three juvenile case histories and the list of detainable crimes in the District of Columbia preventive detention statute are instructive (*compare* intervenor's brief at 16n.**, 18n.*, 43, *with* appellees' brief at 57-60), but disagree on the results of the comparisons. On intervenor's count, twenty-two of the thirty-three juveniles are detainable under the District of Columbia statute because they were charged with the "dangerous crimes" (D.C. Code §§ 23-1322[a][1], 23-1331[3]) of taking property from a person with force,* entering a residence or business to commit another crime,** and arson.† One juvenile, McCain (PX 15a, b), is detainable because he was charged with a "crime of violence" (D.C. Code

* Allen (PX 27a, b), Ancrum (PX 35a, b), Basnight (PX 10a, b), Cox (PX 7a, b), Fargas (PX 26a, b), Forde (PX 7a, e), Gomez (PX 20a, b), Jacobs (PX 28a, b), Martin (PX 1a, b), Morgan (PX 3a, b), Price (PX 5a, b), Rosario (PX 2a, b) and Santiago (PX 13a, b).

** Gregoire (PX 23a, b), Jenkins (PX 4a, h), Lopez (PX 24a, b), McLaughlin (PX 43a, b), Melendez (PX 17a, b) and Ramos (PX 8a, b).

† Ascencio (PX 13a, e), Peebles (PX 14a, b), Rodriguez (PX 12a, b).

§§ 23-1322[a][2][ii], 23-1331[4]), assault while on release status for a predicate crime of violence, robbery, and another, Dunaway (PX 21a, b), is detainable because he threatened the complaining witness, D.C. Code § 23-1322 (a)(3).* *Contrast* appellees' brief at 57-58.

Intervenor and appellees appear to disagree about the District of Columbia statute in another respect. Intervenor submits that the statute's list of detainable crimes is neither a constitutional minimum for juvenile preventive detention nor an exclusive definition of non-trivial crimes. *Contrast* appellees' brief, *id.*

Appellees offer (brief at 63-75) two arguments against FCA § 320.5(3)(b) under the third factor in the *Mathews* v. *Eldridge*, 424 U.S. at 334-35, test, risk of error and value of additional or substitute safeguards. The first argument refers (brief at 63) at the outset to the alleged absence of criteria for detention decisions under FCA § 320.5(3)(b), but is, as appellees later state (*id.* at 70), intended to advance the proposition that any juvenile can be detained under § 320.5(3)(b) for any reason in the subjective and unfettered discretion of the court. *Id.* at 64, 70. The proposition is opposed by the express terms of the statute. Any juvenile charged with a crime is considered for release or detention under FCA § 320.5(3)(b), and § 320.5(3)(a) (non-appearance), as any adult charged with a crime is considered for bail, and, in certain jurisdictions, preventive detention. Under the statute, the juvenile is heard on the reasons for release or detention (*see* intervenor's brief at 5-7), and he may be detained only on serious risk of pretrial crime, and only then with the facts and reasons supporting detention stated in the record. *Id.*

The proposition is also opposed by the patent legal sufficiency of the statute and its necessary, limiting effect on

* Of the remaining 9 juveniles, 3 were charged with "crimes of violence" under the District of Columbia statute but did not have predicate crimes of violence. Delgado (PX 19a, b), Cruz (PX 11a, b), and McArthur (PX 6a, b). Five others were on release status or probation on other charges or findings. Hanna (PX 4a, e), Harris (PX 16a, b), Nelson (PX 22a, b), Taylor (PX 16a, e), and West (PX 25a). West was on both release status and probation. One, Parson (PX 18a, b), had 7 prior contacts.

unfettered judicial discretion. Serious risk of pretrial crime is a sufficient post-arrest standard of judicial decision under the due process clause. *United States* v. *Edwards*, 430 A.2d 1321, 1342 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982). The facts and reasons requirement, which shows why a serious risk of pretrial crime was found by a trial court in a particular case, has been held sufficient under the due process clause for critical stages of delinquency proceedings, *Kent* v. *United States*, 383 U.S. 541 (1966), and for enhanced restraints on adult liberty as well, *Wolff* v. *McDonnell*, 428 U.S. 539 (1974).* As appellees now acknowledge (brief at 67), common general considerations, or criteria, including "prior record . . . seriousness of the charge" (A. 105 [majority opinion below]), guide the application of the standard.** The § 320.5(3)(b) standard itself, the facts and reasons requirement incident to it as well as the general considerations applied by Family Court Judges and the transcript of the detention hearing itself oppose appellees' characterization of decision-making

* Appellees attempt (brief at 69 n.50) to distinguish *Kent*, *supra*, on the ground that it did not consider the substantive basis for the decision to transfer the juvenile there involved from juvenile court to adult criminal court. They thus mistake the procedural protections the *Mathews* v. *Eldridge*, 424 U.S. at 334-35, test considers and *Kent* provides for substantive law concerns. They thereby reveal that their true concern at this point is not the alleged unfettered discretion of Family Court Judges under FCA § 320.5(3)(b), but New York's all-crime detention standard. *See also* appellees' brief at 70 n.52 suggesting alleged judicial subjectivity under § 320.5(3)(b) be reduced by limiting preventive detention to certain predicate felonies.

** Appellees quote (brief at 67-68) Judge Quinones' statement that "we all have our own standards and . . . means for determining in our minds the seriousness of the allegations." From this single reference (they provide no other), they attribute to him their own characterizations of FCA § 320.5(3)(b) as fostering unfettered and non-uniform judicial decision-making. Judge Quinones' statement serves exactly the opposite purpose. As appears from the portion of the majority opinion quoted in the text, his reference to the seriousness of the allegations described one of the general considerations, or criteria, appellees themselves now accept for assisting decision-making under § 320.5(3)(b). Claiming that the seriousness consideration, or criterion, must itself be subject to a further limitation because it has a risk of non-uniform or subjective application asks both the inappropriate and the impossible. All guides to decision must become subjective at some point lest there be no decision at all.

under the statute as the exercise of unfettered discretion.* Indeed, the decision-making procedure under § 320.5(3)(b) is exactly the same as the procedure under § 320.5(3)(a), which appellees accept (brief at 93, 94-95) as constitutionally sufficient in all respects.

Appellees' reference (brief at 63) to a "high rate of unnecessary detention" attributable to FCA § 320.5(3)(b) is completely unjustified. The only evidence in the record about detention rates was provided by the Director of Detention Services of the State Division of Youth who informed the district court of the ten percent standard recommended by the National Council on Crime and Delinquency ("NCCD") (A. 163). The standard is for juveniles detained securely as a percentage of all juveniles arrested. *Id.* It has no separate reference to particular forms of detention, *i.e.*, to prevent crime as distinguished from nonappearance, and, in any event, no data was available which would have permitted those comparisons. The NCCD comparisons, secure detainees as against arrests, were made below, conform with the ten percent level and have remained unchallenged throughout this litigation.** Appellees apparently have reference to the majority opinion below which does not consider a detention rate but a legal theory. According to theory, two-thirds of juveniles detained under § 320.5(3)(b) are unconstitutionally punished because they were either released at or before trial or not placed after trial. *See* intervenor's brief at 23-28. The theory was discredited (*id.* at 46-47) and has been abandoned by appellees in this Court. Accordingly, they

* The fact that time in pretrial detention is brief does not mean that it is not readily addressed by writ of habeas corpus and other remedies. Intervenor's brief at 10 n.*. The New York courts have also routinely treated writs raising significant and certainly constitutional issues as capable of repetition yet evading review and addressed their merits. As intervenor observed (brief at 20 n.*), no motion was made to dismiss *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682 (1976), or this case as moot. *Contrast* appellees' brief at 71 n.53, quoting district court's erroneous statement to the contrary.

** The rates and underlying calculations are set forth in intervenor's proposed finding of fact ¶ 48. Record on Appeal Document Number 26A.

cannot rely on it to illustrate alleged unnecessary detention which simply restates the abandoned punishment rationale. For example, Forde's detention under § 320.5(3)(b) is no more unnecessary than it was unconstitutional punishment because he was released when a courtroom was not available for his probable cause hearing. PX 7f.

To the extent that the majority used the ratio of pretrial detentions to releases for the thirty-four juveniles to reflect the system as a whole, it did not affirm a district court finding of fact, as appellees contend, it vacated one (*compare* intervenor's brief at 22 n.* *with* 24 n.**) and erroneously substituted its own. *Pullman Standard* v. *Swint*, —— U.S. ——, 102 S.Ct. 1781, 1782 (1982). The majority opinion's substituted finding was clear error since the thirty-four juvenile histories were not an adequate random sample from which to draw statistical conclusions about all juvenile delinquency proceedings in New York.

Conclusion

For the foregoing reasons, the judgment below should be reversed and New York Family Court Act § 320.5(3)(b) declared constitutional under the due process clause.

Dated: New York, New York
January 10, 1984

Respectfully submitted,

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Nos. 82-1248, 82-1278

In the Supreme Court of the United States

October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,
Appellant

and

ROBERT ABRAMS, as Attorney General of the State of New York,
Intervenor-Appellant

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,
Appellees

On Appeal From the United States Court of Appeals for the Second Circuit

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT AND INTERVENOR-APPELLANT ON BEHALF OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, OREGON, SOUTH CAROLINA, UTAH, VERMONT, WASHINGTON, WYOMING AND AMERICAN SAMOA

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INTEREST OF AMICI CURIAE

The undersigned Commonwealths, States and Territory offer this brief as amici curiae in support of Appellant Schall and Intervenor-Appellant Abrams.

All amici have juvenile law provisions which are similar to New York's challenged provision. All allow brief preadjudication detention of alleged delinquents based on judges' evaluations of the likelihood of certain adverse behavior of the juveniles occurring between arrest and adjudication.[1] This type of detention is commonly referred to as preventive detention. This Court's determination in this case will, necessarily, have a profound effect on amici for if New York's system is unconstitutional, then a great many of the systems operated by amici may also be invalid.[2]

Amici urge this Court to reverse the Second Circuit and hold that New York's juvenile preventive detention statute is constitutional. We do so because, despite its shortcomings, the juvenile justice system is worth preserving. We echo the sentiments of this Court when it stated "[p]erhaps that ultimate disillusionment [with a separate juvenile system] will come one day, but for the moment we are disinclined to give impetus to it." *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (plurality opinion). That day has *not* come; but, the elimination of preventive detention would put the juvenile justice system in grave risk of extinction by seriously eroding public support for its separate existence.[3] Such a grave risk need not be taken.

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[1] The adverse behavior varies by state. See Appendix A for a summary of the provisions in the amici states.

[2] A case similar to this is currently pending in Pennsylvania, *Coleman et al. v. Stanziani et al.*, No. 81-2215 (E.D. Pa., filed May 29, 1981).

[3] *See* Argument III. C. *infra*.

SUMMARY OF ARGUMENT

Given the procedural protections of the New York Family Court Act[4] (hereinafter generally referred to as Juvenile law; specific sections are referred to as FCA §), due process is fully satisfied when, after arrest and before an adjudication of delinquency, an alleged delinquent is detained based on a finding that there is a serious risk the child may commit a crime before the determination of delinquency. This conclusion is mandated by application of a "fundamental fairness" analysis—the appropriate framework for evaluation of due process challenges to juvenile proceedings.

The first indicator that the challenged provision satisfies fundamental fairness is a comparison of the challenged provision and practices related to it with similar provisions and practices applied to adults. In New York, as in amici states, juveniles, like adults, are detained only if there is probable cause to believe they committed the crime charged. This, combined with a right to a speedy adjudication, is all that is required by the Constitution to justify detention between arrest and adjudication. Assuming, however, that New York's statute creates a statutory liberty interest requiring additional justification before a juvenile can be detained, the justification—serious risk that the child would commit a crime—and the procedures for determining whether it exists are similar to those found con-

[4] L. 1982, c. 920, §1 (1) McKinney's Session Law News of New York at 1982-148 (Jan. 1983), *as amended by*, L. 1982, c. 926 (*Id.* at 1982-255), and L. 1983, c. 398, §§1-50, adding Art. 3, *Juvenile Delinquency*, to the New York Family Court Act.

stitutional in other contexts and are constitutional themselves.

Even if the juvenile procedures did not fully meet the due process required of similar adult procedures, they would, nonetheless, still be valid under fundamental fairness because of the recognized differences between the adult criminal and juvenile systems. Preventive detention protects both the juvenile and the community; it serves these protective interests better than its alternative—bail—would. And, its elimination would seriously undermine public support for the juvenile system. Moreover, the use of preventive detention for juveniles has gained widespread acceptance in this country; it is favorably recommended in model juvenile statutes and in a variety of studies. In light of these considerations, fundamental fairness would not require abandonment of preventive detention.

ARGUMENT

I. The Applicable Standard for Evaluating This Due Process Challenge to Preadjudication Detention of Juveniles Is Fundamental Fairness

This Court does not "automatically and peremptorily" apply constitutional rights given adults accused of crimes to juveniles accused of delinquency. *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (hereinafter *McKeiver*).[5] Instead, the Court uses a "fundamental fairness" standard for evaluating due process challenges to juvenile court proceedings, *id.* at 543; that is, whether a particular procedure, standard, or right "is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." *In re Winship*, 397 U.S. 358, 359 (1970) (footnote omitted).

Certainly no more stringent standard would be applied to *preadjudicatory* proceedings.[6] Thus, the question raised in this case is simply whether the fundamental fair-

[5] Four justices joined the plurality opinion. Justice Brennan, concurring in part and dissenting in part, did agree with the plurality that the same procedural rights given adults need not be applied to juveniles.

[6] This Court has not yet had occasion to articulate the standard by which preadjudicatory challenges must be evaluated. But, it has recognized that the preadjudicatory stages are "distinctive" to the juvenile system, *In re Winship*, 397 U.S. 358, 366-367 (1970), and it has been careful to limit application of the fundamental fairness analysis to the delinquency adjudicatory pro-

ness standard forbids preadjudication detention of juveniles when there is probable cause to believe that they have committed a crime and that there is a serious risk they will commit another crime if released prior to their adjudicatory hearing. There is no easily applied method of evaluating whether that standard is met. *McKeiver* does, however, give considerable guidance.

There, in evaluating whether fundamental fairness required that juveniles be given jury trials, the Court first examined that right as applied to adults. *Id.* at 540-41. A finding that an adult's right to a jury trial was "fundamental to the American scheme of justice" did not, however, answer the question of whether it was required for juvenile delinquency adjudications. *Id.* Rather, the Court went on to consider a number of other factors before concluding, based on those factors, that fundamental fairness did not require that juveniles be given jury trials. Most of these other factors can be grouped in two categories: (1) whether imposition of the asserted due process right would adversely affect the unique and beneficial aspects of the juvenile system, *id.* at 545, 547, 550; and, (2) whether current thinking reflected in model acts, standards, statutes, case law and studies demonstrates a widely held belief that the challenged practice is fundamentally unfair. *Id.* at 545-46, 548-50. Under the *McKeiver* analysis, the procedures New York provides for determining whether a juvenile should be detained prior to adjudication are constitutionally adequate.

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cess itself—expressly excluding "pre-judicial stages." *In re Gault*, 387 U.S. 1, 13 (1966); *In Re Winship*, 397 U.S. at 358, 359 n. 1. Although this suggests that a lesser standard might be applicable in evaluating preadjudicatory proceedings, we apply the fundamental fairness standard here.

II. A Comparison of Due Process Given Adults in Analogous Situations Demonstrates That the Challenged Procedures Satisfy Fundamental Fairness

A. Because adults' constitutionally guaranteed liberty interests are not abridged by pretrial detention if there is probable cause to believe they committed the crime charged, a fortiori juveniles' constitutional liberty interests are not abridged by preadjudication detention that is similarly based.

The starting point, as *McKeiver* teaches, is an analysis of whether and to what extent adults are entitled to the constitutional protection being asserted by the juvenile. This Court has determined that adults may be subjected to pretrial detention if sufficient due process is given. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (hereinafter *Gerstein*).

The essential due process requirement for a pretrial "extended restraint of liberty" of an adult accused of a crime is an adequate determination that there is probable cause to believe the individual committed the crime. *Id.* at 114. That determination combined with the Sixth Amendment right to a speedy trial, as an outside limit to the length of detention, adequately protects an adult from an improper pretrial deprivation of liberty.[7] *Baker v. McCollan*,

[7] By constitution or statute most jurisdictions have established a right to bail during this pretrial period for adults charged with noncapital offenses. *See e.g.*, 18 U.S.C.A. §3146; Alaska Const., art. I, §11; Fla. Const., art. I, §14; Pa. Const., art. I, §14; Wash. Const., art. I, §20. This Court has not definitively ruled on whether there is a federal constitutional right to bail. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). The Court has, however, strongly suggested that there is none. *Carlson v. Landon*, 342 U.S. 524, 545-46 (1952) (none exists in deportation cases).

443 U.S. 137, 144, 145 (1979). Certainly, juveniles are entitled to no greater protection than adults and even assuming, *arguendo*, that their rights are identical, New York's juvenile system satisfies constitutional requirements.

An alleged delinquent may be arrested, before the filing of a petition, on probable cause or may be taken into custody after the filing of a petition.[8] A child may be arrested on the same probable cause determination as an adult. Thereafter, the juvenile must be released to parents or taken either to juvenile court or to a juvenile detention facility. FCA §305.2. If the child is taken to a detention facility, the facility authorities must, pursuant to court rules, initially decide whether the allegations against the child appear to show he or she committed a delinquent act. If they do not, this initial, informal probable cause determination results in the child's release. FCA §307.3. If the child is not released by the facility, he or she must be taken to juvenile court within the next court session day or 72 hours whichever is sooner. *Id.* Once taken to court (either

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See Sistrunk v. Lyons, 646 F.2d 64, 70 (3d Cir. 1981) (holding that there is none in criminal cases). This difficult question need not be addressed by the Court in this case. Even if a federal constitutional right to bail exists for adults, it would not necessarily exist for juveniles. *See McKeiver*. Virtually all courts that have addressed the question of whether juveniles have the same rights to bail as have been enacted for adults have concluded that the pre-adjudication release provisions of juvenile acts are adequate substitutes for bail. *See* note 40 *infra*.

[8] The juvenile delinquency petition is the instrument through which a delinquency proceeding is initiated. FCA §310.1. It is served on the juvenile along with a summons, FCA §312.1, or warrant, FCA §312.2. It must contain allegations sufficient to "provide reasonable cause to believe that the [juvenile] committed the crime or crimes charged." FCA §311.2.

by the arresting officer or by facility personnel), there is a "preliminary determination hearing" to decide, *inter alia*, whether the juvenile court has jurisdiction. FCA §307.4. This implicitly requires a preliminary probable cause finding because the juvenile court would only have jurisdiction over an alleged delinquent if, in fact, there were some reason to believe the child committed a crime. Within four days of this determination, the child is given another opportunity for a more formal probable cause hearing which is adversarial. *Id.*; FCA §§325.1-325.3. These procedures are very similar to those utilized for adult arrests without warrants which were cited by this Court with apparent approval in *Gerstein*, 420 U.S. at 124 n.25.

If a child is taken into custody after the filing of a petition, he or she is also entitled to several probable cause determinations. First, the petition itself must contain information sufficient to establish probable cause. FCA §311.2. After the petition is filed, an "initial appearance" before the court must be held within the sooner of the next court session day or 72 hours. FCA §320.2. There the court must determine, *inter alia*, whether detention is necessary. FCA §320.4. Implicit in this is an assessment of probable cause; if probable cause to believe the juvenile committed the crime were lacking there would be no need for detention. The juvenile is then entitled to the same formal probable cause hearing provided to a child arrested prior to the filing of a petition, FCA §§325.1-325.3, which must be held within three days of the initial appearance or four days of the petition's being filed, whichever is sooner. Again, under *Gerstein*, these procedures would be sufficient for adults accused of crimes. *Gerstein*, 420 U.S. at 124 n.25. *A fortiori*, they are more than sufficient when applied to juveniles.

While the due process afforded juveniles through the probable cause determinations is similar to that given adults, the protection given detained juveniles under the statutory speedy trial requirement is much greater than that given adults. In New York an adult's trial on a felony must commence in six months, N.Y. Crim. Proc. Law (Consol.) §30.30.1(a); a detained juvenile's fact-finding hearing on a felony, however, must commence in 17 days.[9] FCA §§307.4, 320.2, 340.1.

As is noted above. the Constitution does not afford any greater rights to juveniles than to adults. Thus under *Gerstein* and *McCollan*, juveniles, as well as adults, constitutionally may be deprived of their liberty based on a finding of probable cause to believe that they have committed the crime charged. New York requires such a finding before or promptly after a juvenile's preadjudication detention commences. No further justification is constitutionally required in the absence of a separate, state-created liberty interest. *See Hewitt v. Helms*, 103 S.Ct. 864 (1983).

In this regard, New York's statute does not require preadjudication release unless, *inter alia*, there is a serious risk that the juvenile would commit a crime if released. FCA §§307.4.4(c), 320.5.3. Even assuming that this creates a statutory liberty interest and requires justification in addition to probable cause for preadjudicatory detention,

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[9] Compare, *e. g.*, Alaska—120 days for adults, Alaska R. Crim. Pro. 45, 30 days for juveniles, Alaska R. Children's Pro. 7; Kansas—90 days for adults in custody, Kan. Stat. §22-3402, 30 days for juveniles, Kan. Stat. §38-1625(a); Pa.—180 days for adults, Pa. R. Crim. Pro. 1100(a)(2), 13 days for juveniles, 42 Pa. Cons. S. Ann. §6335.

New York's statute is valid because the determination of this additional consideration is made with sufficient due process.[10]

B. Because in various analogous contexts adults may be deprived of liberty if there is a finding that they are likely to behave in a prohibited manner, a fortiori juveniles may be deprived of liberty on the same basis.

In New York, the preadjudication detention determination requires the decisionmaker to evaluate the likelihood of certain future behavior of the juvenile—conduct which would constitute a crime if committed by an adult. This is a constitutionally permissible standard on which to base the detention decision.

This Court has specifically rejected the contentions "that it is impossible to predict future behavior and that the question [of whether it is probable that a defendant would commit a crime of violence and be a threat to society] is so vague as to be meaningless." *Jurek v. Texas*, 428 U.S. 262, 274-75 (1976) (hereinafter *Jurek*). Moreover, it has done so in the context of the ultimate loss of liberty—

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[10] The Second Circuit's holding that New York's preventive detention provision violated due process because its "substantively and procedurally unlimited" terms resulted in detention of many alleged delinquents who either would not be adjudicated guilty or would not be sentenced to confinement if found guilty, *Martin v. Strasburg*, 689 F.2d 365, 374 (2d Cir. 1982), is in error for several reasons. First, even in the adult criminal justice system, the final disposition of a case is irrelevant to the legality of pretrial detention, *Baker v. McCollan*, 443 U.S. 137, 145 (1979); and, second, as will be shown herein, the procedures are not so unlimited as to violate due process.

imposition of the death penalty.[11] In so doing, the Court recognized that although it is not easy to predict future behavior, "[t]he fact that such a determination is difficult . . . does not mean that it cannot be made." *Id. See also Barefoot v. Estelle,* 51 U.S.L.W. 5189 (U.S. July 6, 1983) (reaffirming the holding in *Jurek*).

Indeed, this type of judgment invariably is an important element in many decisions affecting liberty and property interests. *See Jurek,* 428 U.S. at 275. In addition to death penalty decisions it is used in: initial sentencing decisions,[12] including whether to sentence as a "special dangerous offender";[13] modification of sentencing, such as commutation[14] or granting of parole;[15] internal administrative prison decisions, such as whether to impose administrative segregation;[16] parole revocation;[17] bail decisions pending sentencing or appeal;[18] pretrial detention deci-

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[11] This Court has not yet had occasion to rule on the validity of adult preventive detention. *See Bell v. Wolfish,* 441 U.S. 520, 534 n.15 (1979). See further discussion of adult preventive detention at note 20 *infra.*

[12] *Jurek,* 428 U.S. at 275, 275 n.10, (dicta); *United States v. Neary,* 552 F.2d 1184, 1194 (7th Cir.), *cert. denied,* 434 U.S. 864 (1977).

[13] 18 U.S.C.A. §3575 (Supp. 1983); *United States v. Davis,* No. 82-1442 (3d Cir., June 21, 1983) (Slip Op. attached as Appendix C.)

[14] *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 464 (1981).

[15] *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1, 9-10, 13 (1979); *Jurek,* 428 U.S. at 275, 275 n.11 (dicta).

[16] *Hewitt v. Helms,* 103 S.Ct. 864, 873 (1983).

[17] *Morrissey v. Brewer,* 408 U.S. 471, 480 (1972).

[18] *See, e.g.,* 18 U.S.C.A. §3148 (Supp. 1983); *Jurek,* 428 U.S. at 275 (dicta); *Rehman v. California,* 85 S.Ct. 8 (1964) (Douglass as Cir. J.); *Carbo v. United States,* 82 S.Ct. 662 (1962) (Douglass

sions, including bail pending trial (determination of the likelihood defendant will flee and the conditions which would prevent flight),[19] and adult preventive detention;[20]

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as Cir. J.); *United States v. Baca*, 444 F.2d 1292 (10th Cir.), *cert. denied* 404 U.S. 979 (1971); *State v. Dodson*, Mo. App. , 556 S.W.2d 938 (1977).

[19] *See, e.g.*, 18 U.S.C.A. §3146 (Supp. 1983); *Jurek*, 428 U.S. at 275 (dicta); *see also Fernandez v. United States*, 81 S.Ct. 642, 644 (1961) (Harlan as Cir. J.).

[20] The federal bail statute does not expressly allow consideration of the likelihood that a defendant will be a danger to the community if released. *Compare* 18 U.S.C.A. §3146 *with* §3148. *But see* H.R. 3005, 98th Cong., 1st Session (May 12, 1983) and U.S. Dept. of Justice, *Attorney General's Task Force on Violent Crime, Final Report* (U.S. Gov't Printing Office, 1981) at 50-51 (both proposing reform of adult bail to allow consideration of future dangerousness).

Some courts have held that *state* court judges have inherent power in the exercise of their discretion to deny bail if relase would endanger the community. *See, e.g., Nail v. Slayton*, 353 F. Supp. 1013 (W.D. Va. 1972); *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S.D.N.Y. 1969); *Wansley v. Wilkerson*, 263 F. Supp. 54 (W.D. Va. 1967); *People v. Melville*, 62 Misc. 2d 366, 308 N.Y.S.2d 671 (1970); *cf. Fernandez v. United States*, 81 S.Ct. 642 (1961) (Harlan as Cir. J.) (bail revoked during trial based on threats to witnesses); *Carlson v. Landon*, 342 U.S. 524 (1952) (bail prior to deportation hearing denied on grounds of dangerousness in the discretion of the Attorney General).

Adult preventive detention is now authorized by statute or rule in several jurisdictions. The first preventive detention statute for adults was that passed by Congress for the District of Columbia, D.C. Code §23-1322; (constitutionality upheld in *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) *cert. denied*, 455 U.S. 1022 (1982)). Subsequently several other jurisdictions have adopted provisions which permit pretrial detention of an accused for the protection of others or the community. *See, e.g.* Cal. Const. art. I, §12 (*as amended* June 8, 1982); Fla. Const. art. I, §14 (*as amended* Nov. 2, 1982); Mich. Const. art. I, §15(c).

mental health commitments;[21] and, various other civil law contexts, such as those requiring an assessment of the "best interests" of a child[22] and whether there is standing to seek an injunction.[23]

C. Procedures for determining the likelihood of future conduct have been found to be adequate in analogous situations; thus, New York's juvenile procedures are, likewise, adequate.

The specific procedural protections required in establishing the likelihood of future behavior in the different

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It has been recognized that, through imposition of high money bail requirements, judges detain defendants they believe to be dangerous. *See* National District Attorneys Assoc. (NDAA), *National Prosecution Standards* (1979) at 141, 146; National Assoc. of Pretrial Service Agencies (NAPSA), *Performance Standards and Goals for Pretrial Release and Division—Pretrial Release* (1978) at 38. As reform of the adult money bail system eliminates this *de facto* preventive detention, the need for express authority to detain for protective purposes is being recognized. *See e.g.*, NDAA Standards, Standard 10.8 A. 6 and 7, at 139 and 146; NAPSA Standards, Standard VII at 35-44; American Bar Association, *Standards for Criminal Justice*, Standard 10-5.9(b)(i) and (ii), at 10.95 (allowing pretrial protective detention in limited circumstances). The reform, in fact, is bringing the adult detention law closer towards the juvenile law; that is, a presumption of release without the need for posting of security unless certain circumstances are present.

[21] *Addington v. Texas*, 441 U.S. 418, 425-26 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975)

[22] *See, e.g., Planned Parenthood Assoc. v. Ashcroft*, 51 U.S.L.W. 4783, 4787 (U.S. June 15, 1983) (upholding constitutionality of allowing judge to determine whether an immature minor should have an abortion); *Santosky v. Kramer*, 455 U.S. 745 (1982) (involuntary termination of parental rights).

[23] *See, e.g., Los Angeles v. Lyons*, 103 S.Ct. 1660 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

situations mentioned above varies. *Compare* cases and statutes cited in notes 13-23 *supra*. This variation exists because due process "is flexible and calls for such protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *See also, Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979). Despite the variations, some generalizations can be garnered from the cases. Application of these general principles to New York's statute demonstrates that it satisfies due process.

The specific process due in any particular case depends on "a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *See also Addington v. Texas*, 441 U.S. 418 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The government functions involved here are important: protecting the child[24] and protecting the public by controlling crime.[25] Preventive detention is an essential part of the overall pretrial stage where the goals of protecting and informally dealing with the child are strongest and the due process concerns more limited. The child's interest is, of course, a liberty interest.[26] But the maximum "deprivation" which can occur is 17 days.

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[24] See Argument III. A. *infra* for discussion of how preventive detention protects the child.

[25] *Cf. Gerstein*, 420 U.S. at 112 (purpose of adult pretrial detention in controlling crime).

[26] It has been suggested, however, that a child's liberty interest is not coextensive with an adult's because he or she is subject to parental control. *Morris v. D'Amario*, R.I. , 416 A.2d 137, 140 (1980).

1. *Nature of the proceeding*—In New York, a juvenile has at least three opportunities for release if the likelihood he or she will commit a crime is not established. At each proceeding to determine probable cause (see *supra* at 7-8) a determination of this likelihood is also made. This includes the "preliminary determination" hearing, FCA §307.4; the "initial appearance," FCA §§320.2-320.5; and the formal probable cause hearing, FCA §325.3.3. At each stage the juvenile is represented by counsel and, presumably, is entitled to be heard.[27] Moreover, while these hearings need not be adversarial, *see Gerstein*, 420 U.S. at 120, New York's formal probable cause hearing is. In addition, a statement of the facts and reasons supporting the finding must be given. FCA §§307.4.4(c), 320.5.3.

2. *Information to be considered* — The decision-maker should consider all available information relevant to

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A child released pending adjudication would not, like an adult, "gain individual freedom from custody, but would simply be restored to parental custody." *Baker v. Smith*, Ky. , 477 S.W. 2d 149, 151 (1971). *See also, Pauley v. Gross*, 1 Kan. App. 2d 736, , 574 P.2d 234, 240 (1977). *Cf. Parham v. J.R.*, 442 U.S. 584 (1979) (due process requirements for a child's commitment to mental institution with parental consent not as rigorous as involuntary commitment of an adult); *Planned Parenthood v. Ashcroft*, 51 U.S.L.W. 4783, 4787 (U.S. June 15, 1983) (immature minor female's right to an abortion may be subject to conditions (judicial judgment of best interests) that adult's right may not be).

[27] The statutory provisions governing the first two of these stages do not explictly state that the juvenile has a right to be heard. But the provisions for counsel clearly contemplate a right to be heard. Moreover, when the statute is read in the context of constitutional principles, as it must be, the right to be heard is implicit. *See Kent v. United States*, 383 U.S. 541, 553 (1966). Certainly, a judge could not make the required "determination" without hearing the facts and views presented by the juvenile.

the assessment of likelihood that the juvenile would commit a crime if released, allowing a decision that is particularized to the individual. *See Fernandez v. United States*, 81 S.Ct. 642, 644 (1961) (Harlan as Cir. J.); *see also Hewitt v. Helms*, 103 S.Ct. 864, 874, 874 n.9 (1983); *United States v. Edwards*, 430 A.2d 1321, 1337 (D.C. (1981), *cert. denied*, 455 U.S. 1022 (1982). Specific factors need not be specified in the statute if, as here, there is a right to a hearing, counsel, and a statement of reasons. *See Kent v. United States*, 383 U.S. 541 (1966); *see also, Jurek*. These rights and the absence of rigid criteria properly allow the decisionmaker to consider "all possible relevant information about the individual defendant whose fate it must determine." *Jurek*, 428 U.S. at 276; *see also, id.* at 271; *Planned Parenthood Assoc. v. Ashcroft*, 51 U.S.L.W. 4783, 4787 (U.S. June 15, 1983) ("best interest" sufficient criteria for judges to determine if immature pregnant minor should have an abortion); *United States v. Davis*, No. 82-1442 (3d Cir., June 21, 1983) (18 U.S.C.A. §3575 is not unconstitutional although it contains no factors for determining whether offender is dangerous).

New York's statute follows this trend in not specifying a catalogue of factors to be considered. It does, however, require that all decisions consider the "needs and best interests" of the juvenile and the community's need for protection.[28] FCA §301.1.

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[28] *Compare*, D.C. Code, §23-1322(b)(2)(B)(ii), referencing §23-1321(b) which lists factors to be considered in adult preventive detention. This listing—which by its term is not exhaustive—is so broad and general that it amounts to little more than a direction to consider all factors indicative of the individual's particular circumstances.

The determination of whether the juvenile would commit a crime is a practical, non-technical determination. *See Barefoot v. Estelle*, 51 U.S.L.W. 5189, 5194 (1983); *Jurek*, 428 U.S. at 275-76 (decision made by jury); *see also Estelle v. Smith*, 451 U.S. 454, 472-73 (1981); *cf., Gerstein*, 420 U.S. at 112, 121. Making the determination calls for an "experienced prediction based on a host of variables," *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 16 (1979) (analogous determination in parole revocation), for which the experiences of the juvenile court judge amply qualifies him or her.

The information on which the decision is based cannot be as complete as that required in the assessment of likelihood in the death penalty determination. *See Jurek*, 428 U.S. at 276. But, it is as complete as possible given the time constraints in which the decision must be made. *See United States v. Edward*, 430 A.2d 1321, 1337 (D.C. 1981); *see also Hewitt v. Helms*, 103 S.Ct. 864, 874 (1983). And, again, the consequences in the preventive detention determination are not as dire as those in the death penalty determination. There simply can be more tolerance for error.

3. *The burden of proof*—The burden by which the likelihood of future conduct must be proven varies. The greater the liberty or property interest at jeopardy, the higher is the required degree of proof. *See Gerstein*, 420 U.S. at 121; *compare, Jurek* (statutory standard of beyond a reasonable doubt burden for death penalty) *with Santosky v. Kramer*, 455 U.S. 745 (1982), *and Addington v. Texas*, 441 U.S. 418 (1979) (clear and convincing burden for involuntary termination of parental rights and for lengthy mental illness commitment), *with Williams v. Illinois*, 399 U.S. 235, 243 (1970), *and* 18 U.S.C. §§3146, 3148 (judicial discretion for sentencing and for setting bail).

It is unclear whether New York's statute specifies the degree of proof necessary to establish the likelihood the juvenile would commit a crime. The standard of proof is either "serious risk," *see* FCA §320.5.3(b), or it is not specified. If the standard is "serious risk" it exceeds constitutional requirements, as will be shown below. If none is specified, the statute must be read in the context of relevant constitutional principles, *see Kent*, 383 U.S. at 553, and, therefore, the minimum standard of proof required by due process is implicitly contained in the statute.[29] In either case, the statute is constitutional.[30]

Of the examples given above of decisions requiring a determination of the likelihood of future behavior, the juvenile preventive detention decision is most similar to the adult pretrial bail and preventive detention decisions. In making the determination of the likelihood an adult would flee and what conditions, if any, would guarantee the accused's presence, the standard of proof required is "judicial discretion." *See* note 19 *supra*. The pretrial deprivation of an adult's liberty which may result from this decision is vastly longer than the allowable detention of a juvenile. There is nothing inherently more difficult or un-

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[29] The task of determining the applicable constitutionally minimum degree of proof has, in fact, "traditionally been left to the judiciary to resolve." *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 284 (1966); *accord, Santosky v. Kramer*, 455 U.S. 745, 755-56 (1982). States may, of course, statutorily impose a higher degree of proof than that imposed by the Constitution. *Santosky*, 455 U.S. at 769-70; *Addington v. Texas*, 441 U.S. 418, 431 (1979).

[30] This is *not* a case like *Santosky v. Kramer*, 455 U.S. 745 (1982), in which the statute expressly specified a burden of proof less stringent than that required by due process and, therefore, had to be found unconstitutional.

reliable in predicting the future commission of a crime than in predicting flight from the court's jurisdiction or the conditions that will prevent flight.[31] *United States v. Edwards*, 430 A.2d 1321, 1342 (D.C. 1981).[32] Thus, if judicial discretion is adequate in the adult bail context, it is adequate in the juvenile preventive detention decision.[33]

Judicial discretion requires that there be reasonable grounds for the decision. *Burns v. United States*, 287 U.S. 216, 222-23 (1932); see also, *Leis v. Flynt*, 439 U.S. 438, 455 n.26 (1979) (Stevens, J., dissenting on other grounds). Because a reasonable ground is also required for a probable cause determination (*see Gerstein*, 420 U.S. at 111), the three standards—judicial discretion, reasonable grounds, and probable cause—are extremely similar.[34] Therefore, by analogy to *Gerstein*, just as the decision to detain an accused adult pretrial requires no more than a finding of probable cause to believe the accused committed

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[31] In fact, in some jurisdictions an assessment of whether the accused adult presents a danger to the public is a factor considered in deciding whether to release the defendant on his or her own recognizance, or nominal bail, or on full bail. *See e.g.*, Alaska Stat. §12.30.020; Or. Rev. Stat. §135.230(6)(g); Pa. R. Crim. Proc. 4003(a)(3).

[32] The adult preventive detention statute upheld in *Edwards* now authorizes detention for up to 90 days. D.C. Code §23-1322(d)(4) (Supp. 1983). While one of the requisite findings requires proof by clear and convincing evidence, §23-1322(b)(2)(A), and another requires substantial probability, §23-1322(b)(2)(C), no specific burden is specified for the finding of likelihood that the safety of the community would be endangered, §23-1322(b)(2)(B).

[33] The judicial discretion standard is also consistent with the "best interest" standard employed in many decisions involving children. *See* cases cited note 22 *supra*.

[34] *See Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (appearing to equate probable cause and reasonable grounds).

the offense, so too in order to detain preventively an alleged delinquent there need only be probable cause to believe he or she would commit a crime. *See L.O.W. v. District Court of Arapahoe,* Colo. , 623 P.2d 1253, 1254 (1981).

As the foregoing discussion demonstrates, assessments of the likelihood of future prohibited conduct form the basis for decisions in many and varied circumstances. Although the assessment cannot be made with absolute certainty, it is an accepted basis for many decisions affecting individuals' liberty. Its efficacy as a basis for determining the preadjudicatory detention of children is at least equal to, if not greater than, its efficacy as a basis for rendering the many other kinds of decisions affecting liberty for which it is routinely used. The procedures and standards contained in New York's juvenile act provide sufficient safeguards to ensure that the detention decision is not violative of due process.

III. Elimination of Preventive Detention Would Adversely Affect the Juvenile Justice System and Is, Therefore, Not Required by Fundamental Fairness

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When determining whether fundamental fairness requires that juveniles be accorded the same contours of constitutional protection accorded to adults, the Court has been careful not to require substantial alterations in the juvenile system if such changes would "compel states to abandon or displace any of the substantive benefits of the juvenile process." *In Re Gault,* 387 U.S. 1, 21 (1967); *see also McKeiver.* Elimination of preventive detention would have this result in at least the three ways discussed below.

A. Elimination of preventive detention would hinder the state's ability to protect the juvenile from the consequences of the crime which there is reason to believe he or she would commit.

The state has "a *parens patriae* interest in preserving and promoting the welfare of [a] child." *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). Preventive detention furthers this goal by protecting the juvenile from the adverse consequences that would result if the juvenile had been released and committed a crime. These consequences include the obvious further subjection of the juvenile to the authority of the juvenile court or to the criminal justice system.

Committing successive delinquent acts sets the child on a downward spiraling pattern that may require more drastic rehabilitation in the juvenile system, or even punishment in the adult system, and consequent hindrance to the child's moral development. By use of preventive detention in cases in which it is likely that the child will soon commit another crime, the juvenile system seeks to break the pattern, spare the child additional rehabilitation or punishment, and aid the child in maturing into a law-abiding citizen. *Morris v. D'Amario,* R.I. , 416 A.2d 137, 140 (1980).

One of the premises for juvenile statutes is that, because of his or her immaturity, a child may not always exercise good judgment. The restraints that keep an adult released on bail from committing crimes may not operate similarly to restrain a child. *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, , 385 N.Y.S.2d 518, 520-21, 350 N.E.2d 906, 909 (1976). A child is particularly susceptible to peer pressure and bad influences. *Id.* The child may not appreciate the nature of his or her acts and may view them as a "lark," a "dare," or a "prank." *Id.*

He or she may not be properly supervised and may be in an atmosphere which would foster delinquent behavior. *Id. See also Baker v. Smith,* Ky. , 477 S.W.2d 149, 151 (1971). In short, "in situations where [society] requires protection, the minor may be detained because the same acts that threaten society also threaten the minor. . . ." *Aubry v. Gadbois,* 50 Cal. App. 3d 470, 475, 123 Cal. Rptr. 365, 368 (1975).

B. Elimination of preventive detention would necessitate adoption of an alternative; the likely alternative—bail—would not serve juveniles' or the public's interests.

If preventive detention was unavailable, the state would have little choice but to use a bail system for children.[35] Bail would not only fail to satisfy the governmental interests presently served by preventive detention, but would, in addition, create new, and more troublesome, problems.

For example, the use of bail would "not necessarily result in a juvenile's release from detention." *L.O.W. v. District Court of Arapahoe,* Colo. , 623 P.2d 1253, 1258 (1981). Thus, bail would not correct the problem

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[35] Certainly, a delinquent child who has been taken into custody upon probable cause and who, it is reasonably believed, will commit a crime, need not simply be released into the community with no effective protection for the child or society. It is unrealistic to believe that society would tolerate such a system. Unquestionably, it can be presumed that if juvenile court judges could not order detention in the limited circumstances now allowed under state law, they would be forced to use a bail system despite its ineffectiveness as is described in this section of amici's brief. States that do not use preventive detention do use a bail system. *See* President's Commission on Law Enforcement and Administration of Justice, Task Force Report; *Juvenile Delinquency and Youth Crime* (U.S. Gov't Printing Office 1967) at 5.

of over-utilization of detention which the Second Circuit apparently perceived in holding New York's statute unconstitutional (*Martin v. Strasburg*, 689 F.2d 365, 374 (2d Cir. 1982).

> If children are detained too frequently, a right to bail will not remedy the practice. Hill, The Constitutional Controversy of a Juvenile's Right to Bail, [1 Hastings Const. Law Q. 215 (1974)]; 18 Vanderbilt L. Rev. 2096, 2107 n.51. It is more likely that were it recognized, a right to bail would become a substitute for other, more appropriate forms of release. Commentary to American Bar Association's Juvenile Justice Standards Relating to Interim Status (1980) at 66.

L.O.W., 623 P.2d at 1258. *See also Doe v. State*, Alaska , 487 P.2d 47, 52 (1971). In fact, a child may be less likely to be released on bail than through the current juvenile procedure. *See Fulwood v. Stone*, 394 F.2d 939 (D.C. Cir. 1967) (vacating district court's setting of bail (which juvenile could not meet) on grounds that release may be appropriate under the substitute for bail provided in the juvenile system).

Moreover, bail will not work for children because most will not have sufficient financial resources of their own to restrain their behavior—they simply have too little to lose. In practice, a child's right to pretrial release would "depend on the economic position of his parents rather than considerations relevant to the goals of the Juvenile Court Act." *Id.* at 943 n.13; *accord, Kinney v. Lenon*, 447 F.2d 596, 599 n.5 (9th Cir. 1971); *see also Doe v. State*, Alaska , 487 P.2d 47, 52 (1971). The parents may feel obliged to obtain bail for their child even if they do not feel able to control him or her. The

child's behavior will not necessarily be restrained and the child will not learn that he or she must be responsible for his or her own actions. On the other hand, the parents may be unable or unwilling to post bail. *L.O.W. v. District Court of Arapahoe,* Colo. , 623 P.2d 1253, 1258 (1981). This could create animosity between the child and parents which necessarily would have an adverse effect on the child's proper development and future behavior.

Bail "is one of those attributes of the criminal process that it is wise for the juvenile court system to be free of." *Kinney v. Lenon,* 447 F.2d 596, 599 n.5 (9th Cir. 1971). It would "cause unexplored difficulties for most juveniles." *L.O.W.,* 623 P.2d at 1257. Preventive detention under limited circumstances is

> more in keeping with the purposes of the family court than bail, will more adequately protect juveniles against unwarranted restraints on their liberty, and will not be subject to the abuses and injustices that have occurred in the adult criminal justice system as a result of reliance on bail and other financial conditions for release.

United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice,* Report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention (U.S. Government Printing Office, July 1980) at 295-96.

C. Elimination of preventive detention may threaten the continued existence of the juvenile system.

Elimination of preventive detention and the inevitable substitution of bail would result in the juvenile sys-

tem becoming more like the adult system. But, if the juvenile system is made to parallel the adult "there is little need for its separate existence." *McKeiver*, 403 U.S. at 551. Not only would the need for a separate system be reduced but so too would the public's support for a separate system.

Juvenile law represents a delicate balancing among competing interests: providing adequate procedural safeguards for juveniles; preserving a system through which guidance and rehabilitation—not criminal responsibility, guilt and punishment—can be given; and, protecting society.[36] *See Kent v. United States*, 383 U.S. 541, 554 (1966). It is unlikely that society will continue to support the juvenile system's preferential treatment of children if it feels this balance is upset in a manner which leaves the public inadequately protected.

The public believes that there has been a substantial increase in juvenile crime. *See* Christian Science Monitor, Dec. 8, 1982 (Mid-Western Ed.) at 6 (reporting results of national survey by the Opinion Research Corp. showing 87% believe juvenile crime has been rising sharply; *see also New York Times*, July 24, 1981, Sect. A, at 1, Col. 5. Public Opinion Polls from Hutzler. In response to this perception there has developed a discernible trend to reduce the juvenile court's jurisdiction and increase that of the adult criminal court. *Id.*; Hutzler, *Canon to the Left, Canon to the Right: Can the Juvenile Court Survive?*, 1 Today's Delinquent 25 (National Center for Juvenile Justice) (1982). States' juvenile laws have been amended in recent years: to exclude from juvenile court jurisdiction children accused of committing certain enumerated of-

[36] *See e.g.*, FCA §301.1; 42 Pa. Cons. Stat. Ann. §6301.

fenses, to require waiver of a case from juvenile to adult court, to increase substantially the types of cases that may be waived, to make it procedurally easier to waive a case, and to provide for concurrent jurisdiction of juvenile and adult court—thereby giving the district attorney authority to choose the forum.[37] A few states even have altered the stated purposes of their juvenile acts to incorporate such principles as punishment, deterrence, and accountability—principles traditionally associated with the adult system,[38] but foreign to the juvenile system. *Id.* at 33.

The result of the public's "alarm" and "outrage" over perceived increases in juvenile crime, *id.* at 30, has been a "clear trend . . . away from the discretion of juvenile court intake officers and judges to consider the social factors of a child and his family [and] toward criminal justice policies of prosecutorial discretion and decision-making based on present offense and prior record." *Id.* at 35. Elimination of preventive detention will fuel the public's alarm and outrage and will accelerate this trend. If this trend continues, the distinctions between the adult and juvenile systems will be obliterated and, indeed, as *McKeiver* recognized, "there [will be] little need for [the juvenile court's] separate existence." 403 U.S. at 551. The *amici* states urge this Court to act as it did in *McKeiver* by upholding the challenged statute and, thereby, refusing to give impetus to the ultimate disillusionment with the juvenile system. *Id.*

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[37] See compilation of statutes in Appendix B.

[38] See compilation of statutes in Appendix B.

IV. Current Thinking Reflected in Studies, Standards, State Court Decisions and Model Acts Is That Juvenile Preventive Detention Satisfies Concepts of Fundamental Fairness

In determining that denial of jury trials did not violate fundamental fairness, the Court in *McKeiver* considered various indicators of current thinking on the issue: the recommendation of a presidential task force on juvenile delinquency, 403 U.S. at 545-46; how widespread the practice of non-jury trials was in the states, *id.* at 548-49; the decisions of state courts on the issue, *id.* at 549; and, the provisions of model acts, *id.* at 549-50. Here, as in *McKeiver*, consideration of these sources reflects broad approval of preventive detention of juveniles.

First, in developing standards for the juvenile court system various groups of experts have recommended the use of preventive detention and rejected the use of bail. See United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice*, Report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention (U.S. Government Printing Office, July 1980), at 294-96 and similar standards and recommendations of other organizations cited therein, including the same presidential task force relied on in *McKeiver*.

Second, in *McKeiver* the Court looked at how widespread the practice was to determine "whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 403 U.S. at 548 (citations omitted). There, at least 28 states denied juveniles a jury trial by

statute and others did so by judicial decisions. *Cf. Santosky v. Kramer*, 455 U.S. 745, 749, 767 (1982) (35 states had higher burdens of proof than that declared invalid). Most, if not all, jurisdictions permit preventive detention.[39] The practice of preventive detention is as widespread as was the practice of denying jury trials upheld in *McKeiver*.

Similarly, in *McKeiver* the "great majority" of state courts that had faced the issue concluded that denying juveniles a jury trial was constitutional. 403 U.S. at 549. Virtually every court that has considered whether juveniles have a right to bail[40] or whether they may be preventively detained pending adjudication[41] has held that there is no right to bail and that the child may be detained. Those few courts holding that juveniles have been improperly detained preadjudication have done so on the ground that no due process probable cause hearing was held to justify the detention.[42] These cases do not hold that *preventive detention* is invalid *per se* but only that *any detention without probable cause* is invalid.

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[39] *See* President's Commission on Law Enforcement and Administration of Justice, Task Force Report; *Juvenile Delinquency and Youth Crime* (U.S. Gov't Printing Office 1967) at 5.

[40] *See L.O.W. v. District Court of Arapahoe*, Colo. , 623 P.2d 1253, 1258 (1981) (containing an extensive list of such cases).

[41] *See e.g., Aubry v. Gadbois*, 50 Cal. App.3d 470, 123 Cal. Rptr. 365 (1975); *Baker v. Smith*, Ky. , 477 S.W.2d 149 (1971); *State v. Gleason*, Me. , 404 A.2d 573 (1979); *People ex rel. Wayburn v. Schupf*, 39 N.Y. 2d 682, 385 N.Y.S.2d 518, 350 N.W.2d 906 (1976); *Commonwealth ex rel. Sprowal v. Hendrick*, 438 Pa. 435, 265 A.2d 348 (1970).

[42] *See, e.g., Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976); *Bell v. Superior Court of Arizona*, 117 Ariz. 551, 574 P.2d 39 (1977).

The last indicator of current thinking, model acts, also shows that preventive detention is not fundamentally unfair. Specifically, the same model juvenile acts relied on in *McKeiver*, 403 U.S. at 549-50, permit preventive detention.[43]

[43] Uniform Juvenile Court Act, §14, 9A U.L.A. 1, 1-3. (National Conference of Commissioners on Uniform State Laws—1968); Standard Juvenile Court Act, Art. IV, §16, proposed by the National Council on Crime and Delinquency (6th Ed. 1959); Legislative Guide for Drafting Family and Juvenile Court Acts, §20(a)(1) (Dept. of HEW, Children's Bureau, Pub. No. 472-1969); *see also*, W. Sheridan, *Standards for Juvenile and Family Courts* (Dept. of HEW, Children's Bureau, Pub. No. 437-1966) at 62-63.

CONCLUSION

For the foregoing reasons, the amici states urge this Court to grant the relief sought by Appellant Schall and Intervenor-Appellant Abrams—to reverse the Second Circuit and hold that New York's juvenile preventive detention provisions are constitutional.

Respectfully submitted,

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Dated: August 12, 1983

APPENDIX A

STATUTORY GROUNDS FOR PREVENTIVE DETENTION IN AMICI STATES

States	*Grounds—A Juvenile May Be Detained if:*	*Citation*
Alabama	"release of the child would present a clear and substantial threat of a serious nature to the person or property of others . . .; release of such child would present a serious threat of substantial harm to such child."	Ala. Code §12-15-59(a) (2) and (3)
Alaska	"necessary . . . to protect the minor or the community."	Alaska Stat. §47.10.140
Arizona	there is "reasonable cause to believe . . . that he is likely to commit an offense injurious to himself or others."	R. Pro. for Juvenile Ct. 3(b) (2)
California	"it is a matter of immediate and urgent necessity for the protection of such minor or reasonably necessary for the protection of the person or property of another."	Cal. Wel. & Inst. Code §635.636

Statutory Grounds

Florida	"[t]here are reasonable grounds to believe that the child may physically harm or has threatened to harm witnesses, victims, other persons, or property."	Fla. Stat. §39.032(2)(f)7 (Supp. 1983)
Hawaii	"the child's immediate welfare or the protection of the community requires it."	Haw. Rev. Stat. §571-31 (b)(3)
Idaho	it is required "for their own or the community's protection."	Idaho Code §16-1802(j)
Illinois	"it is a matter of immediate and urgent necessity for the protection of the minor or of the person or property of another."	Ill. Rev. Stat. Ch. 37, §703-6 (Supp. 1983)
Indiana	"detention is essential to protect the child or the community."	Ind. Code §31-6-4-5 (c), (e), (g)
Kansas	"dangerous to self or others."	Kan. Stat. Ann. §38-1632(e) (Supp. 1982)
Louisiana	"there are reasonable grounds to believe that . . . there is a serious risk, based upon his past conduct, that the child will commit an offense if released."	Code of Juvenile Pro. Art. 40(1)

Michigan	the child's "offenses are so serious that release would endanger public safety."	Mich. Comp. Laws Ann. §712A.15(c)
Montana	"his detention is required to protect the person or the property of others or of the youth."	Mont. Code Ann. §41-5-305(1)(a)
Nebraska	it "is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another."	Neb. Rev. Stat. §43-205.03
New Hampshire	necessary "[t]o provide care and supervision for a minor who is in danger of harming himself . . .; or [t]o protect the personal safety or property of others from the probability of serious bodily or other harm."	N. H. Rev. Stat. Ann. §169-B:141 (d)(2)(ii) and (iii) (Supp. 1981)
Ohio	"required to protect the person and property of others or those of the child."	Ohio. R. Juvenile Pro. 7
Oregon	"[w]hen the court makes a written finding that the behavior of the child immediately endangers the physical welfare of the child or of anther."	Or. Rev. Stat. §419.577(5)
S. Carolina	"necessary for the protection of the community or the best interest of the child of another."	S. C. Code §20-7-600 (1976) (Supp. 1982)

Utah	"it is unsafe for the child or the public to leave him with his parents, guardian, or custodian."	Utah Code Ann. §78-3 (a) (30)
Vermont	it is "in his best interests and welfare or . . . public safety and protection reasonably require such detention."	Vt. Stat. Ann. tit. 33 §643
Washington	"[d]etention is required to protect the juvenile from himself or herself; or [t]he juvenile is a threat to community safety."	Wash. Rev. Code §13.40.040
Wyoming	"(i) [p]rotect the child's person; [or] (ii) [p]rotect the person or property of others."	Wyo. Stat. §14-6-206(a)
American Samoa	the child's "immediate welfare or the protection of the community that he be detained."	Am. Samoa Code Ann. §45.0203

APPENDIX B

JUVENILE ACTS RECENTLY AMENDED TO RESTRICT JUVENILE COURT JURISDICTION AND/OR TO MODIFY PURPOSES

Arkansas—Ark. Stat. Ann. §45-420

California*—Cal. Welf. & Inst. Code §707

Colorado—Colo. Rev. Stat. §19-1-104(4)

Connecticut—Conn. Gen. Stat. Ann. §§46b-126(a), 46b-127 (Supp. 1983)

District of Columbia—D.C. Code §16-2307

Florida*—Fla. Stat. §§39.001(2)(e), 39.02(2) (Supp. 1983)

Idaho—Idaho Code §16-1806A, 16-1806(1)(a) (Supp. 1983)

Illinois—Ill. Rev. Stat. Ch. 37, §702-7(6) (Supp. 1983)

Indiana*—Ind. Code §§31-6-1-1(1), 31-6-2-4

Kentucky—Ky. Rev. Stat. §§208E.070, 208F.010

Maine*—Me. Rev. Stat. Ann. tit. 15 §3002(c)

Minnesota*—Minn. Stat. Ann. §§260.011(2), 260.125

Mississippi—Miss. Code Ann. §§43-21-157, 43-23-29

Montana—Mont. Code Ann. §41-5-206(1)(a)(x)

Nebraska—Neb. Rev. Stat. §43-202

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* Indicates changes made in the express purposes of the juvenile law.

New Jersey—N.J. Stat. Ann. §§2A:4A-26, 2A:4-48 (Supp. 1983)

North Dakota—N.D. Cent. Code §27-20-34 (Supp. 1981)

Pennsylvania—42 Pa. Cons. Stat. Ann. §6355(a) (4) (iii)

Tennessee—Tenn. Code Ann. §37-234 (Supp. 1982)

Utah—Utah Code Ann. §78-3A-25 (Supp. 1981)

Vermont—Vt. Stat. Ann. tit. 33 §§635, 635a

Virginia—Va. Code Ann. §16.1-269(A) (3)

Washington*—Wash. Rev. Code §§13.40.010(2) (a), (c), (d), (h), 13.40.110

Wyoming—Wyo. Stat. §14-6-203(c)

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* Indicates changes made in the express purposes of the juvenile law.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-1442

UNITED STATES OF AMERICA

v.

DAVIS, WILLIAM, a/k/a "Country"
William Davis, *Appellant*

Appeal From the United States District Court for the Eastern District of Pennsylvania

D.C. Criminal No. 81-00300-01

Argued April 14, 1983

Before: HUNTER, WEIS, *Circuit Judges,*
and GERRY,* *District Judge*

Opinion filed June 21, 1983

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* Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. On October 14, 1981, appellant William Davis was charged in a one-count indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. App. §1202(a)(1)(1976). Violation of that statute carries a maximum prison term of two years. On October 22, 1981, appellant entered a plea of not guilty.

2. On November 21, 1981, the government filed a Notice of Request for Dangerous Special Offender Status under 18 U.S.C. §3575 (1976 & Supp. V 1981). In that notice the government asked the court to find that appellant was a dangerous special offender as defined by section 3575, if he was found guilty of violating 18 U.S.C. App. §1202(a)(1)(1976). Such a finding can result in

the increase of a defendant's imprisonment to up to a twenty-five year term, 18 U.S.C. §3575(b) (1976).

3. At a hearing conducted on March 22, 1982, appellant changed his plea to guilty. On June 8, 1982, the court conducted another hearing and concluded that appellant was a dangerous special offender. The district court thereafter sentenced appellant to a term of imprisonment of twelve years. This appeal raises five issues concerning the sentence imposed on appellant pursuant to section 3575. We will affirm the judgment of sentence.

I.

4. Section 3575(b) provides that if the district court finds that a person convicted of a felony is also a dangerous special offender, then it shall sentence him to imprisonment "for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for the [underlying] felony." 18 U.S.C. §3575(b) (1976). The definition of a "special" offender applicable to this appeal is an individual who, apart from the underlying felony, has committed two or more felonies on different occasions, who has been imprisoned for at least one of them, and who either committed one of the felonies or was released from imprisonment for one of the felonies within the last five years. 18 U.S.C. §3575(e)(1) (1976 & Supp. V 1981). A "dangerous" offender is an individual for whom "a period of confinement longer than that provided for such [underlying] felony is required for the protection of the public from further criminal conduct by the defendant." 18 U.S.C. §3575(f) (1976).

5. Whenever the government wishes to have a defendant over the age of twenty-one classified as a dan-

gerous special offender, it must file a notice with the court within a reasonable time before trial or the acceptance of a plea of guilty or nolo contendere. 18 U.S.C. §3575(a) (1976). That notice must state with particularity the government's reasons for believing that the dangerous special offender classification is appropriate in that case, *Id.*

6. After a finding of guilty or a plea of guilty or nolo contendere, the sentencing judge must hold a hearing without a jury to determine whether the defendant is special and dangerous as defined by the statute. 18 U.S.C. §3575(b) (1976). The statute provides that "[i]n connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing." *Id.* The judge may consider information submitted during the trial and during the sentencing hearing, and information contained in the presentence report. *Id.* The judge must then make his findings based on proof by a preponderance of the evidence presented, and he must place those findings in the record. In his findings he must include the information on which he relied, as well as the reasons for the sentence which he imposed. *Id.; see United States v. Felder,* No. 82-1420 (3d Cir. April 25, 1983).

II.

7. Appellant first argues that section 3575(b) violates the due process clause of the fourteenth amendment because it allows the sentencing judge to find that a defendant is special and dangerous based on a preponderance of the evidence presented. Appellant argues that due process requires the government to prove beyond a reasonable doubt that a particular defendant falls within the

statutory definitions. *See United States v. Duardi*, 384 F. Supp. 874, 882-85 (W.D. Mo. 1974), *aff'd on other grounds*, 529 F.2d 123 (8th Cir. 1975).

8. Five courts of appeals have specifically addressed that constitutional challenge, and all have rejected it. *See United States v. Schell*, 692 F.2d 672, 676-79 (10th Cir. 1982); *United States v. Inendino*, 604 F.2d 458, 463 (7th Cir.) (per curiam) (affirming 463 F. Supp. 252 (N.D. Ill. 1978)), *cert denied*, 444 U.S. 932 (1979); *United States v. Williamson*, 567 F.2d 610, 615 (4th Cir. 1977); *United States v. Bowdach*, 561 F.2d 1160, 1172-75 (5th Cir. 1977); *United States v. Ilacqua*, 562 F.2d 399, 405 (6th Cir. 1977), *cert. denied*, 435 U.S. 906, 917, 947 (1978); *United States v. Stewart*, 531 F.2d 326, 332-34 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976); *see also United States v. Neary*, 552 F.2d 1184, 1193-94 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977) (considering only the standard of proof required to prove dangerousness); *United States v. Cox*, 556 F. Supp. 812, 813-14 (W.D. Mo. 1983); *United States v. Holt*, 397 F. Supp. 1397, 1399-400 (N.D. Tex. 1975), *modified on other grounds sub nom. United States v. Bailey*, 537 F.2d 845 (5th Cir. 1976), *cert. denied*, 429 U.S. 1051 (1977).

9. While normal sentencing proceedings are not immune from all due process attacks, *see Williams v. New York*, 337 U.S. 241, 252 n.18 (1949); *Townsend v. Burke*, 334 U.S. 736 (1948), the Supreme Court has required only minimal due process protections in those proceedings. *See United States v. Grayson*, 438 U.S. 41 (1978); *Williams v. New York*, 337 U.S. 241 (1949); *see also Gardner v. Florida*, 430 U.S. 349, 358 n.9 (1977) (plurality opinion). The Supreme Court has required additional procedural protections, however, when a convicted indi-

vidual is sentenced to a longer term of imprisonment pursuant to a statute which requires additional fact-finding by the sentencing judge. *Specht v. Patterson*, 386 U.S. 605 (1967).

10. In *Specht* the Court considered the due process rights of an individual who was convicted of a sex-related offense under one Colorado statute and who was then sentenced to an enhanced term of imprisonment pursuant to the Colorado Sex Offenders Act, Colo. Rev. Stat. Ann. §§39-191-1 to -10 (1963). That statute allowed the judge to sentence a convicted individual to a term of imprisonment from one day to life without notice or a hearing, based only on a psychiatric report, if the judge found that the individual posed a threat of bodily harm to the public or was an habitual offender and mentally ill. *Id.* §39-191-2. The Supreme Court struck down the statute in *Specht* holding:

> Due process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.

Id. at 610.

11. We recognize the similarities between the sentencing proceedings provided for by the dangerous special offender statute and the sentencing proceeding involved in *Specht*. *Accord Schell*, 692 F.2d at 676-78; *Bowdach*, 561 F.2d at 1172-75. *But cf. Stewart*, 531 F.2d at 32 & n.2 (finding that *Specht* involves a distinct new criminal charge and is thus distinguishable from section 3575 which involves sentence enhancement based on factors aggravating the underlying offense). Section

3575, however, provides all the procedural protections which the *Specht* Court held constitutionally to be required. It provides for a hearing at which the defendant is entitled to counsel, compulsory process and cross-examination of witnesses. 18 U.S.C. §3575(b) (1976). It also requires the sentencing judge to place his findings on the record in order to allow meaningful appellate review. *Id.; see Felder*, No. 82-1420, slip op. at 13.

12. *Specht* does not hold, as appellant argues, that due process requires all findings made by the sentencing judge be based on proof beyond a reasonable doubt.[1]

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[1] In making that argument appellant relies on language in *Specht* that is part of a lengthy quote from *United States ex. rel Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966). The quoted language states that "[a] defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings." *Specht*, 386 U.S. at 609. All the courts of appeals which have specifically considered the "full panoply" language in *Specht*, however, have concluded that it does not decide the standard of proof question at issue here. *Schell*, 692 F.2d at 677-78; *Bowdach*, 561 F.2d at 1172-74; *Hollis v. Smith*, 571 F.2d 685, 689-90 (2d Cir. 1978); *see* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 Harv. L. Rev. 356, 364-73 (1975). We agree. The standard of proof question was not before either the *Specht* Court or the *Gerchman* court. Indeed, at the time of the *Specht* decision, *In re Winship*, 397 U.S. 358 (1970), which made the proof-beyond-a-reasonable-doubt standard applicable to all state criminal trials, had not yet been decided. *See Bowdach*, 561 F.2d at 1173. Furthermore, we cannot conclude that *Specht* intended fully to equate this type of sentencing proceeding with a criminal trial so as to require identical procedural protections in both contexts. *See generally Bullington v. Missouri*, 451 U.S. 430, 440-41, 446 (1981) (distinguishing sentencing pursuant to section 3575 from a trial on the question of guilt or innocence).

To determine whether due process requires that standard of proof in this type of sentencing proceeding, we must balance the defendant's liberty interest, the risk of erroneous deprivation of that interest, and the government's interest in protecting the community. *See Addington v. Texas,* 441 U.S. 418 (1979); *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). Examining those interests, we cannot disagree with the Fourth, Fifth, Sixth, Seventh, and Tenth Circuits, which have specifically held that the preponderance standard passes constitutional muster.

13. Appellant also argues that the definition of dangerous in section 3575(f) is unconstitutionally vague. Again, five courts of appeals have considered and rejected that vagueness challenge. *See Schell,* 692 F.2d at 675-76; *Williamson,* 567 F.2d at 613; *Bowdach,* 561 F.2d at 1175; *Neary,* 552 F.2d at 1194; *Stewart,* 531 F.2d at 336-37; *see also Cox,* 556 F. Supp. at 813; *Holt,* 397 F. Supp. at 1399. *But see Duardi,* 384 F. Supp. at 885-86. The dangerous special offender provisions do not make being "dangerous" a criminal offense, rather they allow a sentencing judge to enhance the punishment for certain individuals convicted—not of being dangerous—but of the underlying felony. *Bowdach,* 561 F.2d at 1175; *Stewart,* 531 F.2d at 336. *But see Lanzetta v. New Jersey,* 306 U.S. 451 (1939) (involving statute making it illegal to be a gangster). Our inquiry thus must be whether sentencing judges can apply the statutory definition of dangerousness in a non-arbitrary and non-discriminatory fashion. We believe that they can.

14. Preliminarily we note that district judges routinely determine whether a defendant is dangerous for the purposes of regular sentencing and setting bail. *See, e.g.,*

18 U.S.C. §3148 (1976) (permitting release on bail after conviction or in capital cases, unless judge finds danger to community). In addition, legislative history clarifies the intended focus of the dangerousness determination for the purpose of section 3575. Congress included the requirement of dangerousness in order to correct a problem with state recidivist statutes, most of which do not require a judge to find a defendant dangerous before sentencing him. S. Rep. No. 671, 91st Cong., 1st Sess. 88 (1969). Congress recognized that such state laws "cast too wide a net" because not every recidivist is likely to engage in criminal conduct again in the future. *Id.* Congress thus intended to narrow the reach of section 3575 to cover only "those felons whose prior convictions make them likely to repeat" and thus to pose a threat to society. *Id.* In keeping with that purpose, the dangerousness inquiry should focus on the likelihood of future criminality, given the defendant's past record, the presentence report, the nature of the present offense, and the defendant's attitude. *Neary*, 552 F.2d at 1194. In *United States v. Warme*, 572 F.2d 57 (2d Cir.), *cert. denied*, 435 U.S. 1011 (1978), the Second Circuit phrased the inquiry as whether the "nature and frequency of defendant's previous encounters with the law," as well as the other information contained in the presentence report, indicate that the defendant "has no regard for the law and the rights of the public." *Id.* at 62. It noted that the statute does not require a finding that the defendant has a "propensity to cause physical harm to others" in order to satisfy the dangerousness requirement. *Id.* Given its focus on the probability that the defendant will engage in future criminal conduct, we conclude that the statutory definition of dangerousness is not unconstitutionally vague. In so con-

cluding, we join the Fourth, Fifth, Sixth, Seventh and Tenth Circuits.

15. Appellant raises another vagueness challenge to the statute. He argues that the portion of section 3575(b), which provides that the sentence imposed on a dangerous special offender must be "appropriate" and "not disproportionate in severity" to the maximum term of imprisonment for the underlying felony, is unconstitutionally vague. He contends that such language provides "no realistic standards for imposing punishment." Brief of Appellant at 22. The Sixth Circuit rejected that challenge in *United States v. Stewart,* 531 F.2d at 330-35, and we also reject it.

16. Admittedly the proportionality language in section 3575 does not give explicit directions to the judge on how to impose a sentence. As we recognized in *Felder,* No. 82-1420, slip op. at 11, Congress could have adopted a statute which specified the maximum allowable dangerous special offender sentence in terms of a fixed multiple of the maximum sentence for the underlying felony. Congress did not do so, and we do not believe that the decision to provide flexibility in sentencing under section 3575 renders the statute constitutionally infirm.

17. The purpose of the proportionality language in section 3575 is to ensure that "the sentence for an offense remain[s] at least partially focused on that offense rather than on prior conduct or other factors." *Felder,* No. 82-1420, slip op. at 8. Relying on the legislative history of section 3575, in *Felder* we suggested guidelines for sentencing judges in effectuating that purpose:

> In order to give effect to the proportionality requirement, the court imposing a sentence under the

> dangerous special offender provision must keep sight of the fact that the maximum sentence for the underlying felony is the only legitimate base for a proportional section 3575 sentence. In that way the underlying felony, which is the reason that the defendant is in court in the first place, will retain its central place in sentencing. The extent to which that sentence should be augmented will depend on a number of factors, such as the nature and seriousness of the conduct which led to the defendant's characterization as a dangerous special offender in the first place. Thus, for defendants characterized as dangerous special offenders because of recidivism . . . the number, type and time of the prior offenses will be relevant, as well as "information about the defendant, his crime, and the context in which it was committed."

Id. at 12 (quoting S. Rep. No. 671, 91st Cong., 1st Sess. 91 (1969)); *cf. Williamson*, 567 F.2d at 616 (examining nature of underlying offense, legislative purpose of section 3575, and punishment authorized by other recidivist statutes to determine proportionality).

18. Given those guidelines we believe that sentencing judges can implement the proportionality requirement in a non-arbitrary and non-discriminatory fashion. It is true that sentencing under section 3575 leaves much to the discretion of the sentencing judge, but so indeed does normal sentencing. Unlike normal sentencing, however, the dangerous special offender provisions provide a substantial check on the exercise of that discretion in the form of broad appellate review pursuant to 18 U.S.C. §3576 (1976). *See United States v. DiFrancesco*, 449 U.S. 117, 142-43 (1980); *Felder*, No. 82-1420, slip op. at 5-6. We

therefore reject appellant's contention that the proportionality requirement in section 3575(b) is too vague to assure fair sentencing.

19. In addition to attacking the constitutionality of section 3575, appellant also attacks the particular sentence imposed on him pursuant to that statute. He argues that we should vacate his twelve-year sentence because it is disproportionate in severity to the two-year maximum authorized by 18 U.S.C. App. §1202(a)(1) (1976) for the possession of firearms by a felon.

20. In *Felder* the district judge also gave the defendant a twelve-year sentence pursuant to section 3575 after a jury convicted him of violating 18 U.S.C. App. §1202(a)(1) (1976). We remanded for resentencing in that case, not because we concluded that the twelve-year sentence was disproportionately severe, but instead because there was no indication in the record that the district judge had taken the proportionality requirement into consideration when he imposed the sentence. *Felder*, No. 82-1420, slip op. at 13. We declined to adopt a rigid ratio of proportionality in *Felder*. *Id.* at 11. Similarly, here we cannot hold that a sentence that is six times the maximum authorized for the underlying felony will always be disproportionate as a matter of law. *See United States v. Williamson*, 567 F.2d at 616-17 (rejecting proportionality challenge to eight-year sentence imposed pursuant to section 3575 for violation of statute carrying a two-year maximum); *see also United States v. Moccia*, 681 F.2d 61, 66 (1st Cir. 1982) (rejecting proportionality challenge to fifteen-year sentence imposed pursuant to dangerous special drug offender provision, 21 U.S.C. §849 (1976), for violation of statute carrying an eight-year maximum).

21. In reviewing the particular sentence in this case, we note preliminarily that we are not faced with the problem that we faced in our attempt to review the sentence in *Felder*. The district judge in this case specifically recognized the statutory proportionality requirement and carefully recited his reasons for imposing the twelve-year sentence. Furthermore, his reasons are completely consistent with our guidelines in *Felder*.

22. In this case the judge carefully considered the seriousness of the firearms offense to which appellant had pled guilty. Supp. app. at 16a, 18a. He then detailed the nature of appellant's conduct leading to his classification as a dangerous special offender. *Id.* at 16a-19a. He noted that appellant had been arrested twenty-eight times and had been convicted of eleven crimes, six of which were felonies. One of his convictions was for atrocious assault and battery, and another was for murder. Both of those crimes involved firearms. Appellant had been convicted of two state weapons violations, and he had also been convicted on two previous occasions of violating 18 U.S.C. App. §1202(a)(1) (1976). Another conviction was for the distribution of heroin in violation of 21 U.S.C. §841 (a) (1976). Focusing on appellant himself, the judge noted that he had no roots in the community, was not married, had no regular residence, no regular employment and no regular income. The judge further indicated that appellant had been granted probation in many of his convictions and had not succeeded on probation. He also noted that appellant had been arrested on drug charges even while out on bail in this case. The judge then concluded that given appellant's record of violence with firearms as well as his other serious offenses, "only a sub-

stantially enhanced period of incarceration will serve the congressional purposes" of section 3575. *Id.* at 16a. Before imposing the twelve-year sentence, the judge specifically took note of the proportionality requirement and concluded that the sentence which he was imposing was not disproportionate in severity to the maximum term for the underlying felony. *Id.* Reviewing all the reasons recited by the district court and the particular facts in this case, specifically appellant's history of criminal conduct involving the use and possession of firearms, we see no reason to disturb the twelve-year sentence.[2]

23. Appellant's final argument is either that his conviction must be reversed or that his sentence must be vacated because his counsel (not his lawyer on appeal) did not inform him until the day that he changed his plea to guilty that the government was requesting the dangerous special offender classification in this case. Appellant phrases his claim as a violation of section 3575's notice requirement. The statute requires only that the government give notice under seal to the court of its intent to request the dangerous special offender classification within a reasonable time before trial or before the court accepts a plea of guilty. 18 U.S.C. §3575(a) (1976). Here the government clearly satisfied that statutory requirment. It filed its notice with the court on November 21, 1981,

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[2] To the extent that appellant may also be raising an eighth amendment claim, *see* Brief of Appellant at 25, we reject it. *See Rummell v. Estelle*, 445 U.S. 263 (1980) (mandatory life sentence under recidivist statute for individual convicted of third property-related felony does not violate eighth amendment); *Graham v. West Virginia*, 224 U.S. 616 (1912) (mandatory life sentence under recidivist statute for individual convicted three times of horse theft does not violate eighth amendment).

and served the notice on appellant's counsel shortly thereafter. Supp. app. at 37a. Appellant entered his guilty plea roughly four months later.

24. Appellant's claim, therefore, is essentially a claim of ineffective assistance of counsel. His argument is that his counsel's failure to inform him of the government's request prevented him from making a knowing and intelligent decision to change his plea to guilty. Generally, however, appellate courts are unable to consider ineffective assistance of counsel claims on direct appeal because they involve allegations and evidence outside the trial record. *United States v. Frankenberry,* 696 F.2d 239, 241-42 (3d Cir. 1982); *United States v. Sturm,* 671 F.2d 749, 750-51 (3d Cir.) (per curiam), *cert. denied,* 103 S.Ct. 95 (1982); *United States v. Rad-O-Lite of Philadelphia, Inc.,* 612 F.2d 740, 743-44 (3d Cir. 1979); *United States v. Garcia,* 544 F.2d 681, 684 n.1 (3d Cir. 1976). In this case, for example, there is no way that we can determine from the record whether appellant's lawyer ever discussed the consequences of sentencing under section 3575 with him before the day of the hearing where appellant changed his plea. The record does show, however, that the judge carefully explained those consequences to appellant at the time of his change-of-plea hearing. Supp. app. at 4a-6a, 9a.

25. Without expressing any opinion on the merits of appellant's claim, we decline to review it on direct appeal. Our disposition is without prejudice to appellant's ability to pursue his claim in a collateral proceeding pursuant to 28 U.S.C. §2255 (1976). At that time the district court will be able to develop an appropriate factual record.

III.

26. For the reasons expressed in this opinion, we will affirm the judgment of sentence.

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Clerk of the United States Court of Appeals for the Third Circuit

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Nos. 82-1248, 82-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELLEN SCHALL, Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, Attorney General of the State of New York,
Appellants

v.

GREGORY MARTIN, *et al.*,
Appellees

On Appeals from the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES

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Appellees

On Appeals from the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

The American Bar Association [hereinafter ABA] is a voluntary, national membership organization of the legal profession. Its nearly 300,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement

and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields. Since its inception over one hundred years ago, the ABA has taken an active interest in the improvement of the administration of justice, and in recent years a specific interest in the improvement of the administration of the juvenile justice system.

In 1973 the ABA became co-sponsor of the Juvenile Justice Standards Project, initiated two years earlier by the Institute of Judicial Administration. The purpose of the project was to develop a set of standards addressing major issues in the administration of the juvenile justice system comparable in scope and comprehensiveness to the ABA *Standards for Criminal Justice*. Toward this end the ABA involved distinguished lawyers and judges as well as specialists in social work, psychology, education, sociology, psychiatry, corrections, law enforcement, and health care, in the drafting of proposed standards. Tentative drafts were widely distributed to members of the legal community, juvenile justice specialists, and organizations directly concerned with the juvenile justice system for study and comment. The work of the Juvenile Justice Standards Project culminated in the publication of twenty-three volumes of standards relating to almost every aspect of juvenile justice administration. The House of Delegates of the American Bar Association approved twenty of the twenty-three volumes as the official policy of the ABA. Among those volumes approved is one entitled *Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition* [hereinafter *ABA Juvenile Detention Standards*], adopted by the House of Delegates in February of 1979.

The *ABA Juvenile Detention Standards* speak directly to the subject matter before the Court in this lawsuit: pretrial detention of accused juvenile offenders. The ABA

considers pretrial detention of children "one of the most serious problems in the administration of juvenile justice." *ABA Juvenile Detention Standards* at 1. The strict limitation of detention prior to adjudication has been identified as one of the ten basic principles underlying the entire Juvenile Justice Standards Project. *Juvenile Justice Standards: A Summary and Analysis* (1982) 22-27. In fact specific reference is made to the practice in New York State as an illustration of "the inadequacy of procedures for the pretrial detention of juveniles which these standards would address." *ABA Juvenile Detention Standards*, commentary to Standard 6.6 at 80. (*People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518, 350 N.E.2d 906 (1976), the New York State Court of Appeals decision upholding the statute subsequently challenged by the plaintiffs in this case is the subject of two pages of critical commentary. *ABA Juvenile Detention Standards* at 80-82).

The *ABA Juvenile Detention Standards* specifically address the importance of those substantive and procedural protections, the absence of which is cited by the Second Circuit Court of Appeals in striking down Section 739(a)(ii) of the New York Family Court Act [recodified by 1983 amendment and hereinafter referred to a F.C.A. § 320.5(3)(b)]. However, because the parties in this action approach the issues raised from a different perspective than that set forth in the Standards, none of the parties has presented the position of the ABA on juvenile detention procedures.

The Association participates as *amicus curiae* to call this Court's attention to the *ABA Juvenile Detention Standards* and to suggest that, for reasons set forth and supported by those standards, this Court affirm the decision of the United States Court of Appeals for the Second Circuit striking down the broad statutory authorization for pretrial detention of juveniles enacted by New York State.

SUMMARY OF ARGUMENT

The pretrial detention of a juvenile constitutes a serious deprivation of liberty protected by the Fourteenth Amendment to the United States Constitution. In determining the constitutionality of a statutory scheme for effecting pretrial detention, traditional due process analysis requires the Court to balance the private interests affected, the risk of erroneous deprivation of these interests through the procedures used, the probable value of alternative or additional procedures, and the governmental interest, including the function involved and the burden of alternative or additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

It was the analysis and examination of these factors in the context of the pretrial decisionmaking process that resulted in the generation of the *ABA Juvenile Detention Standards*. The ABA sought to evaluate the individual and governmental interests at stake, identify appropriate circumstances for pretrial detention in light of these interests, and propose procedures to ensure that such circumstances are established with an acceptable degree of accuracy by procedurally fair means before such detention is imposed. The *ABA Juvenile Detention Standards* are not a minimum due process model nor does the ABA ask the Court to adopt them as such. These standards do represent a balanced resolution of a serious societal problem. They seek to reconcile the sometimes competing goals of protecting both community safety and individual liberty. The ABA efforts thus provide a touchstone from which factors to be considered in due process analysis can be drawn and against which the challenged practice can be contrasted and evaluated.

The New York Family Court Act permits the detention of any juvenile accused of delinquency when the judge concludes without reference to any established specific criteria that there is a serious risk that the juvenile may commit a crime if released prior to trial. F.C.A.

§ 320.5(3)(b). The statute permits such preventive detention without a prompt prior determination of probable cause to believe that the child committed an offense, without regard to the nature of the charge or the likelihood of incarceration following conviction, and without other substantive and procedural safeguards to restrict such detention to circumstances in which it is necessary to promote legitimate governmental interests. The absence of such safeguards and limitations has resulted in detention which the lower federal courts found to be arbitrary and capricious.

In this brief, the ABA sets forth its position with respect to each of the factors to be considered by the Court under *Mathews v. Eldridge* in determining the constitutionality of the New York procedure for preventive detention of juveniles and argues that an appropriate analysis of these factors supports the affirmance of the decision of the Second Circuit Court of Appeals holding the New York procedure unconstitutional.

ARGUMENT

SECTION 320.5(3)(b) OF THE NEW YORK FAMILY COURT ACT IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PROVIDE SPECIFIC GUIDELINES AND CRITERIA FOR DETERMINING THE APPROPRIATENESS OF PREVENTIVE DETENTION AND THUS RESULTS IN AN UNACCEPTABLY HIGH RATE OF PRETRIAL DETENTION OF CHILDREN WHO POSE NO SERIOUS PRETRIAL THREAT TO COMMUNITY SAFETY

Introduction

The issue before this Court in this case is whether preventive detention of accused juveniles pursuant to Section 320.5(3)(b) of the New York Family Court Act violates the due process clause of the Fourteenth Amendment. The District Court and the Court of Appeals found that the operation of the challenged statute has resulted in the pretrial detention for dangerousness of large numbers of accused juveniles against whom the evidence of guilt is so weak that charges are dismissed or withdrawn or who are found to be insufficiently dangerous upon conviction to be incarcerated. J.A. 59-61, 64-65, 102-103, 111. The Court of Appeals concluded that this high rate of detention of children who are apparently either not guilty or not dangerous results from the overly broad terms of the New York statute and that such detention is arbitrary and irrational. J.A. 112, 114.

The American Bar Association, based upon the analysis of issues relating to pretrial detention set forth in the *ABA Juvenile Detention Standards*, urges affirmance of the Second Circuit decision that the New York statute violates due process. The *ABA Juvenile Detention Standards* provide guidance for those seeking an appropriate balance between governmental interests in protecting the community from pretrial misconduct by those accused of crimes and the liberty interests of those who stand accused but not convicted. They seek to minimize two significant risks in pretrial decisionmaking: the risk of re-

leasing a juvenile who poses a serious danger to society and the risk of erroneously detaining a juvenile who does not.

The *ABA Juvenile Detention Standards* are intended to serve as guidelines for action by legislators, judges, administrators and others responsible for or concerned with the treatment of youths at local, state and federal levels. Though they establish specific procedural and substantive criteria which the ABA considers prudent as a matter of public policy, the ABA does not contend that these procedures are the only ones which comport with the requirements of due process or that they reflect the minimally acceptable constitutional standard.

Nevertheless, the *ABA Juvenile Detention Standards* are relevant to the constitutional issues presented in this case. This combined effort of the large body of experts on the subject, both lawyers and non-lawyers, to agree on the procedures and standards deemed most desirable in the public interest is entitled to be weighed in determining the scope of the constitutional requirements. The New York statute is not unconstitutional simply because it does not conform in each and every respect to the *ABA Juvenile Detention Standards*. However, when procedures for pretrial preventive detention depart so radically from these carefully considered standards, that fact should be given weight in determining what the Constitution requires. The goals of the draftsman of these standards are not very different from the object of the due process clause—a fair system of judicial administration which adequately safeguards the interests of both the public at large and the individual juvenile charged with a crime.

Moreover, the *ABA Juvenile Detention Standards* speak directly to the factors which the Court must address in the course of any due process analysis. They identify relevant interests to be balanced in evaluating any scheme for pretrial preventive detention and examine the value of procedural and substantive guidelines for advancing legitimate state interests while protecting individual lib-

erty. The ABA contends that the Constitution at a minimum requires that there be some procedural and substantive limitations on the use of prediction of dangerousness as a basis for pretrial detention of juveniles. The ABA does not and the Court need not use this particular case to delineate precisely what procedural and substantive limitations are constitutional minima. That may well be more appropriately resolved in the context of a specific case presenting specific alternative criteria and guidelines and presenting a record documenting the results of such detention.

The issue in this case, on the other hand, is the constitutionality of a scheme for preventive detention based upon a prediction of interim misconduct that provides no criteria or limitations for making such a determination. The Amici supporting the appellants suggest that the Court must choose between two extreme positions: that preventive detention without substantive and procedural limitations is constitutional or that no preventive detention whatsoever is constitutional. Amici Curiae Brief in Support of Appellant and Intervenor-Appellant on Behalf of Pennsylvania, et al. at 22-24. The *ABA Juvenile Detention Standards* adopt a middle ground position which recognizes that the extremes fail to account for legitimate concerns of both the state and the child in pretrial detention decisions. The ABA Standards also stand as a strong rebuttal of the assertion made by the Amici that a finding that the New York scheme is unconstitutional will threaten the continued existence of the juvenile justice system. Amici Curiae Brief in Support of Appellant and Intervenor-Appellant on Behalf of Pennsylvania, et al. at 24-26. The *ABA Juvenile Detention Standards* constitute a rejection of the New York approach by experts intimately involved with and actively supportive of the juvenile justice system. These experts favor a more reasoned scheme for preventive detention.[1]

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[1] The assertions of the Amici are reminiscent of those heard when *In re Gault* was argued. In that case it was asserted that

In the following section the ABA sets forth the constitutional test to be applied in this case, and the ABA position with respect to the interests which must be balanced and the factors which must be considered by the Court in applying the test. The *ABA Juvenile Detention Standards* are cited to show that constitutional procedures can be drafted which protect legitimate state interests while avoiding the excessive rate of error that characterizes the operation of the New York statute. The comparison of the *Standards* with the New York statute helps to highlight the substantive and procedural deficiencies of the New York statute which, when viewed in light of traditional due process analysis, render the statute invalid, as the Court of Appeals for the Second Circuit held.

A. Procedures such as those set forth in the ABA Juvenile Justice Standards will significantly reduce the risk of erroneous pretrial detention which presently exists under Section 320.5(3)(b) without unduly affecting legitimate governmental concerns for community safety.

The essence of the ABA position with respect to pretrial detention of juveniles under the challenged statutory scheme is that additional safeguards are constitutionally required to reduce the high incidence of errone-

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substantive or procedural limitations on the juvenile court's discretion would compel the states to abandon the substantive benefits of the juvenile process. 387 U.S. 1, 21 (1967). The Court found there that absence of substantive and procedural limitations on the decisionmaking process in juvenile court and radical departure from traditional legal principles of the criminal justice system resulted in arbitrariness rather than benevolence, unfairness to individuals, and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. *Id.* at 19-20. The Court correctly held then that standards and limitations on the unbridled discretion of the juvenile court were not contrary to the purposes and goals of the juvenile court. The Court's finding in this regard is as applicable in the context of pretrial detention decisions as it was in the context of the adjudicatory hearings addressed in *Gault*.

ous detention that results under the New York statute. Of course, given the recognized state interest to protect the public it is essential to set forth an alternative which will advance that interest without running afoul of the Fourteenth Amendment. The *ABA Juvenile Detention Standards* provide procedures and criteria for effecting detention when necessary and appropriate in the pretrial period, without the high margin of error which results under the New York statute.

First, the *ABA Juvenile Detention Standards* distinguish between the state interest in preventing pretrial behavior which threatens the physical safety of the community and that criminal misconduct which presents less compelling justification for pretrial intervention. The risk of error in predicting dangerousness in general remains great, *see, e.g.*, Diamond, "The Psychiatric Prediction of Dangerous," 123 U.Pa.L.Rev. 439 (1974); Dershowitz, "Psychiatry in the Legal Process: A Knife that Cuts Both Ways," 51 Judicature 370 (1968); however, the countervailing interests in favor of allowing some consideration of dangerousness when the irreparable harm of violent crime is the perceived danger are substantial. The *ABA Juvenile Detention Standards* therefore recognize as a permissible purpose for pretrial detention or control "reducing the likelihood that the juvenile may inflict serious bodily harm on others during the interim." *ABA Juvenile Detention Standards* 3.2B. While the New York Family Court Act allows detention to prevent any criminal misconduct, pretrial preventive detention under the *ABA Juvenile Detention Standards* focuses specifically on prevention of crimes of direct violence and serious crimes against property, such as arson and bombing, which involves substantial risks of serious bodily harm. *Id.*, commentary at 51.

Second, the *ABA Juvenile Detention Standards* distinguish between use of detention to further the permissible goal of community protection and use of means short of

detention. It is a premise of these standards, supported by numerous studies, that release under conditions or release under supervision is a less drastic but very effective alternative for protecting community safety. *See* P. Wise, *Freedom for Sale* 77-79 (1974); W. Thomas, *Bail Reform in America* 244-45 (1976); P. Venezi, *Pretrial Release With Supportive Services for "High Risk" Defendants* 48-49 (1973); National Center for State Courts, *An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs* (1975). Reasonable restrictions on the activities, movements, associations and residences of the accused, prohibiting the accused from possessing weapons or using drugs or alcohol, and requiring periodic reporting to designated persons or agencies are among the conditions of pretrial release which in most cases can accomplish the legitimate interests of the state in the protection of the community. *See ABA Juvenile Detention Standards* 2.6, 2.7, 2.8. *See also, ABA Standards for Criminal Justice: Pretrial Release* [hereinafter *Pretrial Release*] 10-5.2 and commentary thereto. If the conditions of release are tailored to the problems of the individual defendant, he is likely to violate one or more of the conditions and be subject to release revocation for doing so before absconding or committing a new crime. *See, Pretrial Release* 10-5.2, commentary at 72. Violation of conditions of release is a permissible basis for termination of release. *ABA Juvenile Detention Standards* 4.6

Use of pretrial detention as an initial interim status is restricted under these standards to situations in which the charge itself is of the type which poses the most serious threat to the community—a serious crime of violence. *ABA Juvenile Detention Standards* 6.6A. While studies indicate that predictions of proclivity to commit additional crimes in the interim based upon the charge are subject to serious risks of error, there is some support for the assertion that a person who has exhibited violent behavior is more likely to exhibit violent behavior in the

future than the person who has no record of violent behavior. Monahan, *Ethical Issues in The Predication of Criminal Violence* 11 (1978). Thus requiring at least the allegation of serious violent misconduct should reduce somewhat the risk of error. The New York statute by contrast permits detention for dangerousness to be invoked no matter how minor the underlying offense is.

Third, the *ABA Juvenile Detention Standards* permit pretrial detention based on a serious offense only if upon a finding of guilt the disposition is likely to be commitment to a secure facility. *ABA Juvenile Detention Standards* 6.6A.1. If the charge or circumstances are such that commitment is not the likely outcome of the proceedings and the child will be placed back in the community, there is insufficient justification for pretrial detention. Detention under such circumstances is punishment prior to trial. This was precisely the finding of the Second Circuit with respect to the New York procedure and requiring an evaluation of the likelihood of post-trial incarceration is designed to decrease this risk. J.A. 113-14.

Fourth, the *ABA Juvenile Detention Standards* require that the circumstances justifying detention for the protection of the community be established by means that are procedurally fair. They therefore require a prompt release hearing at which a judicial determination of probable cause is made that the accused committed the offense with which he is charged. *ABA Juvenile Detention Standards* 7.6. This is a basic requirement of the Fourth Amendment recognized by this Court in the criminal context, *see Gerstein* v. *Pugh*, 420 U.S. 103, 120 (1975), which is equally applicable to juveniles. *See Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976). The New York statute requires a probable cause determination usually within seventy-two hours but in some circumstances with an additional delay of three judicial days. F.C.A. § 325.1.

Both the *ABA Juvenile Detention Standards* and the New York Family Court Act further require that the ju-

venile be provided notice of the hearing, the right to legal representation, and access to information on which the judge will base his or her determination. *ABA Juvenile Detention Standards* 7.6; F.C.A. §§ 320.2-320.5, 325.2. However, under the standards, the decision to detain based upon risk of misconduct must be made upon clear and convincing evidence both that there is a serious probability of risk of bodily harm to others if the juvenile is released and that no acceptable alternative to detention exists which could reasonably reduce the risk of misconduct. The New York statute requires no standard of proof designed to decrease the risk of error.

While no jurisdiction has implemented precisely the detention criteria set forth in the *ABA Juvenile Detention Standards*, similarly strict criteria have been imposed in a number of instances. The results support the contentions of the ABA regarding the value of criteria and standards in reducing the risk of error. Studies of the effect of implementation have shown that use of narrow and specific criteria can reduce detention without increasing rearrest rates. In one study, for example, data indicated that prior to the implementation of narrow, specific criteria for detention, 280 children out of a total of 425 children were detained. Of the 145 juveniles released, 41 were rearrested within 180 days. In contrast, following the implementation of specific and narrow detention criteria, of 380 cases, 89 children were detained. Of the 291 children released, 38 were rearrested within a 180 day period. Kentucky Youth Advocates, *A Community Response to a Crisis: The Effective Use of Detention in Jefferson County, Kentucky* (1980). In effect, while the number of children who were detained was reduced substantially, there was no increase in rearrests and in fact a significant drop in the rearrest rate. Another study of comparative rates of detention and rearrest following adoption of specific detention criteria showed a reduction in average numbers detained per day from 16 to 12, and

a drop in the rearrest rates of those released from 3.2% to 1.7% Colorado Division of Youth Services, *The Arapahoe Detention Alternative Program* (1981). Use of specific criteria governing the discretion to detain significantly decreases the number of children unnecessarily subjected to pretrial detention without any deleterious effects on public safety.

Articulating a rational explanation for the structure of the New York statute is particularly difficult because New York exempts from preventive detention those children who arguably present the greatest risk of interim crime and instead subjects to such detention those who present the least risk and who are most vulnerable to the harmful effects of detention. Sixteen and seventeen year-olds charged with any offense are processed through the criminal courts, N.Y. Penal Law § 30.00(1) (McKinney Supp. 1982), where they are entitled to release under the traditional criteria applied under the New York bail system. N.Y. Crim. Proc. Law § 530.10 *et seq.* (McKinney Supp. 1982). Fourteen and fifteen year-olds charged with serious crimes are also processed as adults and cannot be detained based on a prediction of likelihood to commit further crime, and thirteen year-olds charged with first or second degree murder are similarly treated. N.Y. Penal Law § 30.00(2) (McKinney Supp. 1982); N.Y. Crim. Proc. Law § 530.10 *et seq.* (McKinney Supp. 1982). Thus the population subject to pretrial detention based on the generalized prediction of dangerousness are the youngest (and most vulnerable) of the juvenile population and those who have committed the least serious offenses.[2]

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[2] The New York scheme for standardless preventive detention of juveniles thus stands in sharp contrast to the adult preventive detention schemes which have been the subject of recent litigation, *see United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981) and *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot per curiam*, —— U.S. ——, 102 S.Ct. 1181, 71 L. Ed. 2d 353 (1982). Even the most ardent supporters of preventive detention recognize

B. Given that far less drastic, yet effective, alternatives to the New York preventive detention scheme exist, section 320.5(3)(b) is unconstitutional under traditional due process analysis.

In determining the constitutionality of a statutory scheme for effecting pretrial detention, traditional due process analysis requires the Court to balance the private interests affected, the risk of erroneous deprivation of these interests through the procedures used, the probable value of alternative or additional procedures, and the governmental interest including the function involved and the burden of alternative or additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

This analysis is not conducted in a vacuum. A most basic constitutional principle is that no person can be punished without first being convicted of a crime by proof beyond a reasonable doubt following a trial at which a host of procedural and substantive rights are guaranteed. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979). This principle, the essence of the Fourteenth Amendment prohibition against deprivation of liberty without due process of law, is applicable to incarceration of juveniles pursuant to delinquency proceedings whether the purposes of such incarceration are termed punishment or treatment and rehabilitation. *See In re Winship*, 397 U.S. 358 (1970), *In re Gault*, 387 U.S. 1 (1967); *see also Breed v. Jones*, 421 U.S. 519, 530 and n.12 (1975). Nevertheless, the

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that substantial limitations and safeguards are necessary. *See e.g.*, Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," 55 Va. L. Rev. 1223, 1235-39 (1969), Hruska, "Preventive Detention, the Constitution and the Congress," 3 Creighton L. Rev. 36, 39, 46, 54-56 (1969). Indeed the federal Office of Juvenile Justice and Delinquency Prevention, cited by the Amici for appellants in support of their position, advocates implemention of specific detention criteria as the solution to unnecessary pretrial detention of juveniles. *See* National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* 3.152 and commentary at pp. 297-98 (1980).

state may permissably detain a person suspected of committing a crime prior to a formal adjudication of guilt, *see Gerstein v. Pugh*, 420 U.S. 103 (1975), notwithstanding the fact that such detention subjects the accused to many of the same restrictive and burdensome conditions of confinement that are traditionally associated with punishment of the convicted. *See Bell v. Wolfish, supra.*

Historically, in the criminal justice system such a deprivation of liberty based upon accusation rather than conviction has been tolerated, pursuant to certain substantive and procedural protections, because of the state's interest in ensuring that the accused is present at trial. A criminal justice system premised upon punishment following conviction as a means for deterring and penalizing those who would violate the criminal law depends upon the ability of the state to compel the accused to submit to the process. This Court has thus referred to the "right to release before trial . . . conditioned upon the accuseds' giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

While the bail system has been the traditional means for expressing the balance between the liberty interest of the accused in avoiding the pretrial detention and the state interest in avoiding risk of flight, it is the appropriate balancing of individual and legitimate state interests, rather than the bail system itself, that raises the fundamental due process questions in any scheme for pretrial detention, criminal or juvenile.[3]

1. *The Private Interests Affected.*

In analyzing the constitutional issues raised in the context of juvenile delinquency proceedings, this Court has

[3] The ABA takes the position that a bail system is an inappropriate mechanism for achieving the proper balance of state and individual interests in juvenile pretrial detention. *See ABA Juvenile Detention Standards* 4.7 and commentary thereto at pp. 63-66.

stressed the importance of a candid assessment of the realities of the stage of the proceeding under scrutiny. *In re Gault*, 387 U.S. 1, 21, 27 (1967). Such an analysis has led this Court to conclude that the private interests implicated in delinquency proceedings are comparable in constitutionally significant respects to those at stake in criminal prosecutions. *Breed v. Jones*, 421 U.S. 519 (1975); *In re Winship*, 387 U.S. 358 (1970); *In re Gault, supra*. Of all the stages in the juvenile court process, pretrial detention is perhaps the least distinguishable from the criminal process in terms of the seriousness of the consequences for the person detained. This Court has recognized in the adult context the "serious impact on the individual" which pretrial detention entails: the disruption of personal and professional life, the subjection of the person detained to the stark conditions and restrictive practices of pretrial confinement, and the serious consequences of confinement for trial preparation. *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). The *ABA Juvenile Detention Standards* proceed from a premise that the impact of pretrial detention on the rights and interests of the juvenile is of comparable severity.

Besides being removed from family, friends, and school, a child detained pretrial is subject to conditions of confinement and institutional routines and practices which are often harsh. *See* R. Sarri, *Under Lock and Key: Juveniles In Jail And Detention* 35-63 (National Assessment of Juvenile Corrections 1974). *See also, Inmates of Boys Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Creek v. Stone*, 379 F.2d 109 (D.C. Cir. 1967); *Baker v. Hamilton*, 345 F. Supp. 345, 353 (W.D. Ky. 1972); *Cox v. Turley*, 506 F.2d 1347 (6th Cir. 1974). While certain extreme detention practices may be constitutionally prohibited, the decisions of this Court make it clear that once lawfully detained, a person may be subjected to personal indignities and hardships in the name of jail administration which, while constitutionally

permissible, are admittedly onerous and offensive to the individual. *See Bell v. Wolfish*, 441 U.S. 520 (1979).

Pretrial detention creates obstacles to the effective preparation of a defense. *Stack v. Boyle*, 352 U.S. 1, 4 (1951). A defendant detained is "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. at 533. Because investigative resources available to public defenders and appointed counsel are limited, the defendant who cannot help with necessary investigation because he is detained is at a serious disadvantage. Even the able and conscientious lawyer may have difficulty in identifying and locating witnesses since the lawyer is likely to be viewed as an outsider. When the defendant is a juvenile, "these difficulties may be exacerbated by the barriers of age . . ." *Kinney v. Lenon*, 425 F.2d 209, 210 (9th Cir. 1970). The correlation between pretrial detention and conviction which has been noted by numerous commentators in the criminal process, *see e.g.*, Rankin, "The Effect of Pretrial Detention," 39 N.Y.U.L. Rev. 641, 651-52 (1964); Wald, "Pretrial Detention and Ultimate Freedom: A Statistical Analysis," 39 N.Y.U.L. Rev. 640 (1964); L. Katz, et al., *Justice is the Crime* 152 (1972), may be in part attributable to the problems of trial preparation associated with pretrial detention. *See* Note, "Preventive Detention: An Empirical Analysis," 6 Harv. Civ. R.-Civ. Lib. L. Rev. 300, 348 (1971).

Moreover, detention may ultimately contribute to a sentence of imprisonment rather than probation upon conviction since it prevents the defendant from demonstrating an ability to adjust to community life during the predisposition period. *Id.* at 350-51. The impact of pretrial confinement upon disposition is of particular concern in the juvenile justice system. As one study cited by the *ABA Juvenile Detention Standards* noted:

> . . . the symbol of where one is detained has a lasting impact which carries over to where one is ini-

> tially placed. Detention in a custody unit restricts the youngsters' range of placement opportunities. This must underscore the importance of the original decisions concerning the question of whether to detain and where to detain. It seems that we cannot make this point too strongly. We have shown that where one is detained is, at least for those youth without a prior commitment, related to the commitment decision. And we have shown quite conclusively that where one is detained is related to initial program placement.

Coates, Miller, and Ohlin, *Juvenile Detention and Its Consequences* 22 (1975) cited in *ABA Juvenile Detention Standards* at 2. A similar observation is made in Edwards, "The Rights of Children," 37 Fed. Prob. 34, 37 (1973).

Finally, the psychological impact of detention upon children is widely acknowledged to be harmful. *See* National Council on Crime and Delinquency, *Standards and Guides for the Detention of Children and Youth* 3 (1961); R. Garff, *Handbook for New Juvenile Court Judges* 21 (1972); D. Anderson, E. Thomas, and C. Sorenson, *The Child's View of Detention* (1970); Komisaruk, "Psychiatric Issues in the Incarceration of Juveniles," 21 Juv. Ct. J. 117 (1971). Children tend to be more vulnerable, more impressionable, more devastated by separation from friends and family and subject to impersonal bureaucratic detention procedures. *See* Fetrow and Fetrow, "How a Pretrial Facility Can Destroy the Self Esteem of the Juvenile", 18 Int'l J. of Offender Therapy and Comparative Criminology 227-33 (1974); *In re William M.*, 3 Cal.2d 16, 31 n.25, 473 P.2d 737, 89 Cal. Rptr. 33, 43 (1970). The stigma associated with pretrial detention may not only damage the child's "standing and associations in the community", *Arnett* v. *Kennedy*, 416 U.S. 134, 156 (1974), but may in turn increase his associations with and identification with the delinquent subculture and foster delinquent tendencies. "Forced asso-

ciation with other delinquents intensifies [the child's] hostility to society and exalts his status in the delinquent group." Norman, *Think Twice Before You Build or Enlarge A Detention Center* 6 (1968).

The record in this case supports the ABA assessment of the serious consequences of pretrial detention for the juvenile. Beyond the obvious consequences of loss of physical liberty, the testimony presented in the District Court documents that the conditions of confinement in New York are severe, that the dangers of physical abuse as well as psychological harm are significant, and that the consequences for trial preparation and ultimate disposition are serious. J.A. at 105 n.24, 107 n.29, 130-34, 167-69, 172-74, 231-33, 270, 296-98, 303-04.

The several important interests at stake in the decision to detain a juvenile generally and in the specific detention of a juvenile under the New York statute must be given great weight in applying any constitutional balancing test.

2. The Governmental Interest Involved.

As previously discussed, the traditional justification for pretrial detention in the criminal justice system has been the state's interest in ensuring the presence of the accused at trial. As this Court noted recently, it has had "no occasion to consider whether any other governmental objective can constitutionally justify pretrial detention." *Bell v. Wolfish*, 441 U.S. at 454 n.15.

New York asserts its interest in preventing juveniles from committing crimes in the period between arrest and trial as the state interest to be served by the challenged statute. As distinguished from pretrial detention to prevent flight, pretrial detention to prevent future crimes to a significant extent "serves to displace . . . the established system of justice." Note, "Preventive Detention Before Trial," 79 Harv. L. Rev. 1489, 1503 (1966). In addition, unlike pretrial detention aimed at preserving

the jurisdiction and process of the courts, which focuses on such factors as a defendant's ties to the community and employment status, a pretrial determination that a person is dangerous implies a "moral judgment about the person affected" that is a characteristic of the criminal sanction. *See Bell v. Wolfish*, 441 U.S. 520, 581 n.10 (1979) (Stevens, J. dissenting). *See also* Note, "Due Process and the Pretrial Detention Provisions of the Federal Criminal Code Reform Bill of 1981," 47 Alb. L. Rev. 645, 663-64, 670 (1983).

This is not to say that the state's interest in protecting the community from criminal misconduct is not an appropriate factor to consider in pretrial decisionmaking. The bail system has traditionally addressed concerns for public safety in the pretrial period in a number of respects. First, the availability of bail in capital cases has always been discretionary thus allowing specific considerations of the risk of pretrial misconduct in the most serious cases. Second, since such factors as seriousness of the offense and likelihood of conviction can be related to risk of flight, *see Pretrial Release* 10-5.1(vii) and commentary thereto, often those who are perceived to pose a serious interim danger to the community are also those for whom the risk of flight warrants the setting of high bail. Finally, the criminal system has traditionally permitted imposition of conditions for release, violations of which can result in revocation of bail. Both in setting the conditions and in exercising the power to revoke based upon violaton, the system permits an additional mechanism for protecting the public from misconduct during the pretrial period. *See Pretrial Release*, 10-5.2 and commentary thereto.

The ABA has consistently recognized the legitimate interest of the state in protecting the community during the pretrial period, but questions New York's interest in preventive detention without standards or criteria as a method for protecting the community. New York's inter-

est in this particular scheme must be examined in light of its actual impact since whatever may be the appropriate state interests where an individual is demonstrably likely to endanger the community, there can be no question that the erroneous detention of those who do not pose a threat to the community advances no state interest. The state in fact has an interest in avoiding such unnecessary confinement. *See Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

3. *The Risk of Erroneous Deprivation.*

The risk of error inherent in detention decisions ungoverned by specific standards and criteria is borne out by the factual findings of the District Court and Court of Appeals with respect to the operation of the New York statute. Approximately two thirds of those detained pretrial were released within days or weeks either at or prior to disposition. J.A. at 59-61, 64-65, 102-03.

The results of New York's detention scheme are not surprising. The *ABA Juvenile Detention Standards* identify pretrial detention decisions as among the most error prone of any decisions made in the juvenile justice process. Decisions to detain have traditionally been made on the basis of inadequate information, through a rather cursory decisionmaking process, pursuant to broad grants of authority to detain with no specific criteria limiting the discretion of intake officers or judicial officials. *ABA Juvenile Detention Standards* at 2, 5-11. The result of these procedures has been an extraordinary high rate of pretrial detention of juveniles nationally. In 1978, for example, 392,662 children were admitted to secure detention in 372 juvenile detention centers and an additional 479,908 juveniles were detained in 3,493 county jails and 13,383 police lockups across the country. University of Illinois Community Research Center, *An Assessment of The National Incidence of Juvenile Suicide in Adult Jails, Lockups and Juvenile Detention Centers* 9 (1980).

The high rate of error in detention decisions is reflected in the comparison of the number of juveniles held pretrial with the number ultimately incarcerated following adjudication. One study cited by the *ABA Juvenile Detention Standards* revealed that of 409,218 juveniles detained pretrial, only 242,275 were either committed to a facility or placed on probation following adjudication." National Council on Crime and Delinquency, "Juvenile Detention" in "Correction in the United States," 13 Crime and Delinquency 1, 11, 15, 36 (1967). Another study of five jurisdictions found that of those detained pretrial the percentage of those removed from the community following disposition ranged from a low of 9.7% in one community to a high of 25.9% in another. Ferster, Snethen and Courtless, "Juvenile Detention: Protection, Prevention or Punishment", 38 Fordham L. Rev. 161 (1969). A more recent comparison of juveniles detained pretrial in juvenile detention centers (not including those detained in adult jails and lockups) with those ultimately placed in correctional facilities indicates a similar disparity. In 1979 there were 451,810 admissions to juvenile detention centers; however, only 65,416 children were subsequently institutionalized. Krisberg and Schwartz, *Rethinking Juvenile Justice* 12-13 (1981).

In light of the seriousness of the deprivation of liberty which pretrial detention entails, and in light of the existence of alternative procedures such as those set forth in the *ABA Juvenile Detention Standards*, the risk of error presented by detention procedures which allow detention based upon a generalized prediction of dangerous with no specific criteria identified for making such a decision is unacceptably great.

CONCLUSION

For the foregoing reasons, the Amicus Curiae, American Bar Association, submits that the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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Nos. 82-1248, 82-1278

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In The

Supreme Court of the United States

October Term, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

-and-

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

-against-

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE

The Association for Children of New Jersey is a private non-profit corporation which advocates on behalf of children. The

Association began in 1847 as the Newark Orphan Asylum which merged in 1960 with the Newark Children's Aid Society to form the Child Service Association. The Child Service Association merged with the Citizen's Committee for Children of New Jersey in 1978 to become the Association for Children of New Jersey.

The Association is directed by a thirty member volunteer Board of Trustees representing individuals from many backgrounds and interests united in their concern for children. The work of the Association is carried out by a small full time staff and many volunteers from its membership. The Association is one of the oldest and largest citizen advocacy groups for children in the country.

The goals of the Association are to be a voice for families and children, to promote policies and programs for the protection and well-being of children, to monitor laws and programs to assure that children's needs are a priority, and to plan for needs of the next generation.

Pursuant to its goals, the Association has conducted two studies of children placed in detention centers for delinquents and shelters for status offenders. The studies raise a number of concerns about children placed in detention. Foremost is the data indicating that a significant number of juveniles are being detained in violation of N.J.S.A. 2A:4-56(b), New Jersey's detention statute for juveniles. New Jersey's detention law is similar to New York Family Court Act §739(a)(i)(ii), and any decision reached by this Court will effect the standard for detention in New Jersey.

As an independent advocacy group, the Association believes that the results of its studies would be of help to the Court in deciding the case.

SUMMARY OF ARGUMENT

Two studies of children in detention and shelters conducted by amicus revealed that a significant number of juveniles were being detained illegally. Furthermore, a large number of juveniles who were detained prior to trial were subsequently released to their parents, foster parents, relatives, or placed in non-secure residential facilities raising the question of whether they should have been detained at all.

Detention statutes for juveniles should be narrowly drawn with clearly defined standards to insure that juveniles are not inappropriately detained. It has been shown that using narrowly drawn standards will result in a significant reduction in the number of children in detention.

ARGUMENT

Detention statutes for juveniles accused of delinquency must be narrowly drawn with clearly defined standards to insure that juveniles are not inappropriately detained.

Amicus submits that the decision of the Second Circuit Court of Appeals should be affirmed. Not only is the opinion well reasoned and sound legally, it is consistent with the findings and recommendations made by amicus in two studies of juveniles in detention and shelter care.

The first of the two studies, J. Brame, L. Wood, *Children in Detention and Shelter Care: Surveying the System in New Jersey* (1979) (hereinafter cited as *Children in Detention*), is an overview and description of children in detention and shelter care, and the system providing that care. The second study, C. Moore, L. Wood, *beneath the labels* (1981) (hereinafter cited as *beneath*

the labels), is a closer look at the children in detention and shelter care and more directly related to the case at bar.[1]

The studies are especially relevant as New Jersey's detention law is similar to New York Family Court Act §739(a)(i)(ii). N.J.S.A. 2A:4-56(b) permits a juvenile to be detained if it is necessary to secure the child's presence at the next hearing and if the nature of the conduct charged is such that the physical safety of the community would be seriously threatened if the juvenile were not detained. While the law deals only with serious threats to the physical safety of the community, the New Jersey Rules of Court allow a juvenile to be detained for property crimes. R. 5:8-6(e)(i)(b).[2]

---

1. The overall study consisted of three research areas. The first entailed completion of an extensive questionnaire by each facility giving aggregate statistical information on children in the facilities and information on the facilities themselves. *Id.* at 5.

In the second phase, a random sample of the facility records of 544 juveniles who were either in detention or shelter care in seven counties in 1977 were reviewed. These counties accounted for more than half of the over ten thousand admissions to detention in the state for one year. The number of sampled juveniles in detention was 275. *Id.* at 6.

The third phase involved research on a subsample of 102 children who were at risk of long term placement. *Id.* at 6.

A survey was taken in 1980 of juvenile court intake coordinators concerning the decision making process for detaining juveniles in the seven counties previously mentioned regarding the second phase of the study. *Id.* at 12.

2. On December 31, 1983, a new Code of Juvenile Justice for New Jersey will go into effect. The section on detention N.J.S.A. 2A:4A-34(c), reads:

> c. A juvenile charged with delinquency may not be placed or retained in detention under this act prior to disposition, except as otherwise provided by law, unless:

(Cont'd)

Children in Detention, supra, as an overview of the temporary care system, gave the following generalized description of detention centers in New Jersey:

> Detention facilities in New Jersey as in most parts of the country, are comparatively large facilities and are characterized by locks, bars, and other types of restraining hardware. In a number of instances, they resemble jails. . . . Youngsters in detention are subjected to a rigid, highly regimented regime which offers little privacy and free time. They are permitted few contacts with their family or outside world and are generally

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(Cont'd)

(1) Detention is necessary to secure the presence of the juvenile at the next hearing as evidenced by a demonstrable record of recent willful failure to appear at juvenile court proceedings or to remain where placed by the court or the court intake service or based on information presented to the court on the record that there is a likelihood that the juvenile will not appear at the next court proceeding; or

(2) The physical safety of persons or property of the community would be seriously threatened if the juvenile were not detained and the juvenile is charged with an offense which, if committed by an adult:

(a) Would constitute a crime, or would constitute a repetitive disorderly persons offense, provided that the judge determines that there is a likelihood upon adjudication of delinquency for that disorderly persons offense a custodial disposition would be ordered, or

(b) Would constitute a high misdemeanor as defined by the "New Jersey Controlled Dangerous Substances Act". (P.L. 1970, c. 226; C. 24:21-1 et seq.)

> isolated from the community. Few youths are allowed to attend local schools or participate in community activities. As in most temporary facilities, services are relatively limited although most youngsters are provided with some type of educational and recreational program. Youngsters generally are locked in their rooms for specific periods during the day. *Id.* at 10.

The findings on the utilization of detention facilities reads:

> This report points to the excessive use of detention for youngsters processed in New Jersey's juvenile courts. In 1977, there were 10,468 admissions to locked Detention facilities, which was more than twice the number of admissions to JINS facilities (4,453). The percentage of youths detained among the counties differed greatly and could not be explained by such factors as the youth's behavior. A serious examination should be made to determine whether or not youngsters in some counties are being detained who could safely remain in the community. *Id.* at 87.

The report made the following recommendation concerning detention standards:

> *Efforts should be made to limit the use of locked detention through the development of more precise criteria using the national standards as models.* Youths would thus be detained only if there was a "substantial probability" that they would pose a serious harm to persons in the community or not appear in court. *Id.* at 92.

A juvenile may not be admitted into a detention center in New Jersey without the permission of juvenile court intake. Administrative Office of the Courts, *Operations and Procedures Manual for Juvenile and Domestic Relations Court Intake Services* 8 (1977). The operation of these intake units is therefore crucial in assuring uniformity and the appropriateness of detention prior to trial. In *beneath the labels, supra* at 15, it was found that in the seven counties surveyed, there were striking differences in procedure that were not particularly aimed at following the statutory criteria for detention. Each county had a list of offenses for which a juvenile was automatically detained. While all units automatically detained for homicide and sexual assault, the number of offenses triggering detention varied from a low of three to a high of fourteen. All intake units except one admitted minor offenders to detention. Two units would only allow minor offenders to be detained if they had a record of prior offenses, but the remaining four would detain minor offenders if the juvenile lacked an adult custodian, unavailability of an out-of-home placement, or a desire to keep juveniles charged with delinquency apart from status offenders.[3] *Id.* at 15-16. Placing minor offenders in detention for any other reason then a belief that the child would not appear at the next hearing is violative of N.J.S.A. 2A:4-56(b).

The second report found that more than half of the children in the sample of detained youth were held for reasons other than the statutory criteria according to facility records. Thirteen percent of the juveniles were detained for the lack of an appropriate adult custodian in clear violation of N.J.S.A. 2A:4-56(b). *Id.* at 18. A review of the offenses for which juveniles were held revealed that 34% were held on minor charges, including five who were held illegally for status offenses. *Id.* at 18.

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3. Juveniles charged with minor delinquency offenses may be placed in non-secure shelters if they cannot return home.

The length of stay for detained juveniles was surprisingly long and effectively rebuts the commonly held belief that juveniles only spend brief periods in detention. The average length of stay in the seven detention centers was 14.2 days. The shortest length of stay was 4.8 days while in the state's largest center, the average length of stay was 23.7 days. *Id.* at 22-23. While amicus believes that even one day is too long for a juvenile to be inappropriately held in detention, the facts show that the average stay is not insignificant and the argument that we are only dealing with brief periods of detention is spurious.

The post-adjudicative experience for juveniles in detention is similar to New York's. Sixty percent of the juveniles in the sample were returned to their parents or guardians while another seven percent were placed with relatives or foster parents. Only thirteen percent were committed to the reformatory system. *Id.* at 24. There is no adequate explanation why such a large percentage were no longer dangerous after a finding of guilt but were when the presumption of innocence applied. Judge Winters' hypotheses for this in *Martin v. Strasburg*, 689 F. 2d 365, 368-372 (2nd Cir. 1982), is probably true for New Jersey.

The report recommended that a juvenile should not be in detention unless charged with a crime of the first, second or third degree and constitutes a serious threat to the community or has a demonstrable record of willful failure to appear at the hearings. *Id.* at 82. The recommendation is more restrictive than the new detention law, N.J.S.A. 2A:4A-34(c), which allows juveniles charged with fourth degree crimes and repetitive disorderly persons offenses to be detained.

The Governor's Adult and Juveniles Justice Advisory Committee recognized the need for stricter statutory criteria when it wrote:

> Clearly defined criteria are needed to assist in detention and release decisions while ensuring their appropriateness. Structured, workable guidelines are necessary to reduce inconsistency in the handling of juveniles, the nature of programs, and available services. Governor's Adult and Juvenile Justice Advisory Committee, *Standards and Goals for the New Jersey Criminal Justice System: Final Report* 260 (1977).

Commenting on the present detention law and the wide variation in detention rates from county to county, the Advisory Committee wrote:

> "These criteria are designed to be flexible and thus leave room for discretionary interpretation. The desires of local communities, as reflected in police and judicial discretion, may influence the detention of juveniles, causing detention practices to become an outgrowth of local attitudes and tradition. Disparity in detention rates may be based more upon where the juvenile is taken into custody than the nature of the offenses charged or any other factor. Inconsistencies may also suggest criteria are perhaps overly broad and vague. *Id.* at 216.

A study of detention practices at the Passaic County Detention Center by the Community Research Forum has shown that using the detention standards recommended by the National Institute of Juvenile Justice and Delinquency Prevention,[4] a

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4. Juveniles subject to the jurisdiction of the family court over delinquency should not be detained in a secure facility unless:

(Cont'd)

substantial reduction of detained children would result. Community Research Forum, *Report of the Passaic County Juvenile Justice Committee and New Jersey Department of Corrections* 16 (1979). The report also studied the post release status of 360 children who had been in detention and found that 67% were released to non-secure settings with 59% of them returning to their own homes. *Id.* at 17.

(Cont'd)

a. they are fugitives from another jurisdiction (on a delinquency petition);

b. they request protection in writing in circumstances that present an immediate threat of serious physical injury;

c. they are charged with murder in the first or second degree;

d. they are charged with a serious property crime or a crime of violence other than first or second degree murder which if committed by an adult would be a felony, and;

(i) they are already detained or on conditioned release in connection with another delinquency proceedings;

(ii) they have a demonstrable recent record of willful failure to appear at family court proceedings;

(iii) they have a demonstrable recent record of violent conduct resulting in physical injury to others; or

(iv) they have a demonstrable recent record of adjudications for serious property offenses; and

there is no less restrictive alternative that will reduce the risk of flight, or of serious harm to property or to the physical safety of the juvenile or others. National Institute for Juvenile Justice and Delinquency Prevention, *Report of the Advisory Committee to the Administrator of Standards for the Administration of Juvenile Justice: Standards on Adjudication* 83 (1976).

A study of the Essex County Detention Center, R. Khim, *Report to the Essex County Juvenile Justice Advisory Committee and Department of Corrections: Assessment of Essex County Pre-Trial Detention Needs* (1980) (Community Research Forum), using the standards developed by the National Institute for Juvenile Justice and Delinquency Prevention reached results similar to the Passaic study.[5] The report found that out of 207 detained in January of 1980, 110 did not meet the national standard for detention. Ninety-three percent of these children were eventually released to non-secure settings. *Id.* at 13. Thirty-two of the children who did meet the national standard were also released to non-secure settings. *Id.* at 15. Mr. Khim, in his recommendations, wrote:

> • Secure pretrial detention should be reserved only for those children who pose a significant threat to the public safety or court process. The juvenile court should follow specific and objective national standards detention criteria when making pretrial custody decisions. In general, only children charged with high misdemeanor (first, second, or third degree) offenses coupled with a past record of criminal offenses or failures to appear for court hearings should be eligible for detention. *Id.* at 21.

Amicus sees no conflict between stricter detention criteria and the philosophy of the juvenile court. Since most detention

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5. In a study by Mr. Khim of two rural counties and two urban counties (including one rural New Jersey county) using the national standards, there was a significant reduction in the number of juveniles detained. He also studied the appearance rate of released juveniles and found no significant difference in the failure to appear rate. R. Khim, *Prohibiting Secure Juvenile Detention: Assessing the Effectiveness of National Standards Criteria,* 31 Juv. & Fam. Ct. J.3,12,13 (1980).

laws including New Jersey's have a stated preference for release, stricter standards comply with that preference. The opinion of the Circuit Court does not prohibit preventive detention but requires such practices to meet due process standards. Juveniles who are inappropriately detained are neither receiving preferential treatment nor fair treatment. Fair treatment can only strengthen the juvenile justice system. Any system that allows juveniles to be needlessly detained in jail-like facilities deserves to end.

Justice Fortas' often quoted comment in *Kent v. United States*, 383 U.S. 541 (1966), is especially relevant to the case at bar. He wrote:

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. *Id.* at 556.

If the decision below is reversed, then large numbers of children will continue to be detained on grounds that no adult would be detained for and instead of being held in facilities that are appropriate for children, they will be placed in detention centers that are polite euphamisms for jails.

CONCLUSION

For the foregoing reasons, amicus submits that the decision of the Second Circuit should be affirmed.

Respectfully submitted,

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Nos. 82-1248, 82-1278

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982

Ellen Schall, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

Robert Abrams, as Attorney-General of the State of New York,

Intervenor-Appellant,

vs.

Gregory Martin, Luis Rosario, Kenneth Morgan, and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL JUVENILE LAW CENTER ON BEHALF OF APPELLEES

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Statement of Interest

Amicus curiae, the National Juvenile Law Center (NJLC), was established in 1970 to provide specialized legal assistance in the area of juvenile law to state and local legal services, legal aid, public defender and citizens advocacy programs throughout the fifty states and the Commonwealth of Puerto Rico. The NJLC has in the past appeared before this Court as amicus curiae on behalf of children and their families.

The NJLC has concentrated on representing the interests of juveniles who are either facing the prospect of or who are actually being subjected to secure confine-

ment in state or local jails, detention centers or treatment facilities. The constitutionality of the practice of "preventive detention" raised in the case now before this Court is of particular concern to Amicus in that the NJLC (along with the Juvenile Law Center of Philadelphia) is presently representing a similar class of juveniles raising similar challenges in the state of Pennsylvania. Amicus thus has a vital interest in the resolution of this case. Written consent of the parties for the filing of this brief has been filed with the Clerk of the Court.

Summary of Argument

The statutory provision challenged by the Appellees in this case, Section 320.5(3)(b) of the New York Family Court Act, involves what has come to be known as "preventive detention". Under this statutory scheme, Appellants are empowered to place a child in secure confinement prior to an adjudication of guilt whenever Appellants believe that the accused child is likely to engage in further delinquent or criminal behavior while the adjudication hearing on the existing offense is pending. In attempting to defend such a practice, the Appellants and

Amici for the Appellants have raised a number of novel and disturbing arguments, including the rather ominous prediction that the beneficial aspects of a separate juvenile justice system will be destroyed through this Court's affirmance of the rulings of the district court of New York and the Court of Appeals for the Second Circuit. These same arguments were made to this Court in the mid-sixties regarding the provision of such basic constitutional rights as the child's right to counsel and the requirement that guilt be proven beyond a reasonable doubt. The juvenile justice system did not, however, perish with the rendering of this Court's decisions

in Kent v. United States, 383 U.S. 541 (1966), In re Gault, 387 U.S. 1 (1967), or In re Winship, 397 U.S. 358 (1970). Indeed, Amicus for the Appellees asserts that the operation of each state's juvenile justice system was improved through such decisions, benefiting both the child and society. This Court's affirmance of the opinions and orders of the courts below will continue that trend.

Amicus for the Appellees contends that the preventive detention which is authorized by the challenged statutory provision imposes punishment upon the Appellees prior to any adjudication of guilt in violation of the Appellees' constitutional rights.

By the statute's operation, Appellees are deprived of their freedom without a prompt determination of probable cause being made by a neutral and detached judicial officer. Gerstein v. Pugh, 420 U.S. 103 (1975); R.W.T. v. Dalton, 712 F.2d 1225 (8th Cir. 1983); Moss v. Weaver, 525 F.2d 1258 (5th Cir. 1976). Appellees are also deprived of their freedom based upon a prediction that they will commit further crimes unless detained, a prediction that simply cannot be made with any degree of reliability. Furthermore, no matter what degree of predictability may or may not exist in this area, secure confinement cannot be justified on the basis of

behavior and events which have not yet taken place. Such a practice is antithetical to our nation's basic constitutional premises that anyone who stands accused of a crime is presumed innocent until proven guilty in a court of law, that no punishment may be imposed by the state until the accused is found guilty, and that punishment may only be meted out for what the convicted person has done, not for what he may or may not do in the future.

ARGUMENT

I. The Practice of Preventive Detention Imposes Punishment Prior to Any Adjudication of Guilt, Thereby Violating the Appellees' Constitutional Rights.

It is a fundamental principle of this nation's system of laws that a citizen may not be punished for a crime which he has been accused of committing prior to a finding of guilt. Bell v. Wolfish, 441 U.S. 520, 535 (1979). This is particularly true for juveniles such as the Appellees, in that the New York Family Court Act, like the juvenile codes of every state, mandates rehabilitative care and treatment for the child and not the punishment which characterizes the

adult criminal justice system. Amicus for the Appellees do not here argue the issue of whether under such a separate statutory scheme juveniles such as Appellees may ever be subjected to punishment by the state. Amicus for the Appellees respectfully contends, however, that punishment may not be inflicted upon the Appellees prior to an adjudication of guilt, especially under the challenged statutory provision which allows for the imposition of this punishment for crimes which it is feared the Appellee will commit in the future.

> Our criminal system has made a basic choice: crimes are to be deterred by the threat of subsequent punishment, not by prior confinement. States should not be permitted to

> undermine this judgment by substituting pretrial detention...for the existing criminal system which favors freedom prior to conviction.

Sistrunk v. Lyons, 646 F.2d 64, 70 (3d Cir. 1981).

Pretrial detention, be it deemed "preventive" or otherwise, by definition involves a deprivation of personal liberty. Because the liberty interest of the Appellees at stake here is one of the most fundamental of all interests protected by the due process clause of the fifth and fourteenth amendments, the challenged practice of preventive detention is subject to strict judicial scrutiny. United States v. Edwards, 430 A.2d 1321 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982);

People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 385 N.Y.S.2d 518, 350 N.E.2d 906 (1976). Such a practice will be upheld only in the face of a compelling state interest, Roe v. Wade, 410 U.S. 113 (1973), which cannot be protected or promoted by any less intrusive means. NAACP v. Alabama, 377 U.S. 288 (1964). Finally, the statute must be "necessary" for, and not merely "rationally related" to the effectuation of that interest. McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

The application of such a standard of review by this Court flows from the nature of the Appellees' challenge. Unlike the

pretrial detainees in Bell v. Wolfish, who challenged the conditions of their confinement, Appellees here challenge the very fact of their confinement. In Bell v. Wolfish there was no question as to whether the adult prisoners were properly detained in the first place, and therefore the rational relationship standard was deemed to be acceptable. 441 U.S. at 534, n. 15. By challenging the very fact of their confinement, Appellees are entitled to an analysis of preventive detention under the "strict scrutiny-compelling state interest" test.

The Appellants, of course, also have a number of interests which the practice of preventive detention is said to protect and promote. Pretrial detention obviously insures that the accused will present himself for trial. The state also has a moral and economic interest, however, in insuring that those who need not be detained for the above reason are not in fact detained. In addition to the traditional interests served by pretrial detention, Appellants and Amici for the Appellants argue that the practice of preventive detention challenged here serves to protect the public and operates for the benefit of the Appellees.

Punishment is not mentioned as an intended purpose of the statutory provision.

It cannot be argued that the protection of the public pending a juvenile's adjudicatory hearing and the provision of rehabilitative services to the child are not laudable state interests. Preventive detention, however, as it will be shown, is not a constitutionally permissable means for the effectuation of those interests.

Amicus for the Appellees respectfully suggests that Appellants' defense of the challenged statute is simply a matter of semantics and labelling which this Court has historically

held to be nondispositive on the issue of the challenged procedure's actual effect. Gault; Winship; Breed v. Jones, 421 U.S. 519, 530 (1975). The plain language of the statute indicates a clear legislative intent to prevent future delinquency or criminality by locking up the Appellees. The fact that the statute does not include the words "punishment" or "retribution" does not detract from its punitive intent and effect.

> It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent - and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

United States v. Brown, 381 U.S. 437, 458 (1965) (emphasis added).

If the plain language of the challenged statute is not convincing regarding the existence of a punitive statutory purpose and intent, however, the analysis shifts to a consideration of the factors set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). This test was recently utilized in this Court's scrutiny of adult pretrial detention in Bell v. Wolfish. In determining whether Appellees are being punished through the practice of preventive detention, this Court should look to

> [w]hether the sanction involves an affirmative disability or restraint,

> whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry ....

Mendoza-Martinez, 372 U.S. at 168-169 (footnotes omitted). See also, Ingraham v. Wright, 430 U.S. 651 (1977); United States v. General Motors, 403 F. Supp. 1151, 1158 (D. Conn. 1975).

In assessing these factors it is clear that preventive detention imposes an affirmative restraint; the Appellees are deprived of their liberty. The imposition of a

period of secure confinement is in like manner the epitome of what society has historically considered to be punishment. Even more clearly, one of the stated goals of preventive detention is to deter and prevent future criminality, a traditional aim of punishment.

In defense of the statute, an alternative purpose for preventive detention has indeed been forwarded by the Appellants. That purpose is the protection of society and the Appellee. As will be argued in more detail below, however, this alternative purpose is not rationally connected to the operation of the challenged statute. Finally, the practice of locking up Appellees based upon the statute's

untenable premises is clearly excessive; alternative programs such as in-home detention and close pretrial supervision and counselling can be utilized for the protection of the child and society.

Pretrial detention is an onerous punitive experience, especially when the detainee is a juvenile. The accused will spend his days securely confined in some form of institution. He is thereby removed from his family, friends and a normal living environment, all of which are critically important for healthy adolescent development. No matter how brief or prolonged, pretrial detention will have an adverse impact on the

juvenile's schooling or work opportunities. Compounding this problem is the fact that little in the way of constructive services or programming is offered to the youth while he is detained. The detained juvenile is also subjected to the social stigma which attaches to those held in secure confinement by the state. While confined, his ability to assist his attorney in the preparation of his defense is damaged. Finally, the youth's own self-image is adversely affected by the experience of being locked up and a delinquent self-concept may be fostered or reinforced. In these respects, the effects of pretrial detention of the Appellees are hardly different than those

suffered by detained adults accused of criminal behavior. Indeed, in light of the fact that Appellees are children, the punitive effects of pretrial detention are magnified.

Congressional recognition of the harmful and nonrehabilitative effects which secure pretrial detention has on a child can be found in its enactment of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), 42 U.S.C. §5601 et seq. Under the JJDPA, community-based treatment provided in nonsecure settings is to replace the historical practice of secure detention, a practice which is counterproductive to the troubled child's rehabilitative

needs. 42 U.S.C.§5633(10)(H)(iv).

Application of the Mendoza-Martinez analysis to the challenged practice of preventive detention indicates that the actual effect of the statute is punitive, despite the illusory alternative purposes which are asserted in its defense by the Appellants. Punishment thusly imposed upon Appellees prior to a finding of guilt is violative of due process. Bell v. Wolfish, 441 U.S. at 535.

In support of their contentions that future delinquency or criminality can be predicted and that such prediction may form a constitutionally permissible basis for detention, Appellants and their

Amici have relied upon this Court's decisions in Jurek v. Texas, 428 U.S. 262 (1976), and Barefoot v. Estelle, 51 U.S.L.W. 5189 (U.S. July 6, 1983), as well as the decisions in United States v. Edwards and People ex rel. Wayburn v. Schupf. Jurek and Barefoot, however, dealt with adult criminal court sentencing procedures and not with pretrial detention practices. In Barefoot, this Court ruled that it was constitutionally permissible during the course of a jury's deliberations regarding the imposition of the death penalty for the jury to consider evidence of the future dangerousness which a convicted murderer might pose to the community. In other words, the

future dangerousness of a convicted murderer was deemed to be "an acceptable criterion for imposing the death penalty." Barefoot v. Estelle, 51 U.S.L.W. at 5194.

Amicus for the Appellees respectfully contends that the rulings of this Court in Jurek and Barefoot are not controlling regarding the issues now before this Court. Neither decision ruled on the issue of whether predictions of dangerousness can be accurately made. Also, both decisions involved convicted adults who were facing sentencing. Furthermore, the prediction being made in those cases was that of future dangerousness, as evidenced at least in part by the conviction for

a dangerous crime which the jury had just handed down. In the case at bar, pretrial detention may be imposed upon the prediction of any sort of future criminality or delinquency, regardless of its dangerous or nondangerous nature. The Barefoot inquiry is therefore more narrowly focused than that allowed through the challenged statute.

Also, the sanction which results from a Jurek or Barefoot prediction is imposed upon an adult who has already been tried and found guilty of committing a dangerous offense. This is perhaps the most critical distinction between the case at bar and Jurek and Barefoot. In contrast, the

prediction required by the challenged statutory provision now before this Court is made prior to any trial of the accused juvenile in order to allegedly protect the community from future acts of delinquency, thereby punishing the child for crimes he has not committed.

Finally, the prediction of future dangerousness which was made in Barefoot was but an "acceptable criterion" during the sentencing process. Here, the prediction of future delinquency is itself the very reason for imposing the sanction of secure confinement. What is a constitutionally acceptable consideration with regard to a convicted adult

murderer should not be likewise acceptable for a juvenile who merely stands accused of some delinquent act.

More on point in support of Appellants' position are the cases of United States v. Edwards, and People ex rel. Wayburn v. Schupf, though again Amicus for the Appellees contends that they are not controlling. Edwards involved a challenge to the District of Columbia's adult preventive detention statute. The Edwards court upheld the constitutionality of the statute by finding that preventive detention was regulatory rather than punitive because the "established dangerousness" of the accused warranted the curtailment

of "reasonably predictable conduct", and did not "punish for prior acts." 430 A.2d at 1332. Amicus for the Appellees respectfully contends that the Edwards court erred by assuming as fact the very point at issue. A "reasonable" prediction of future criminality implies a degree of accuracy in the prediction which simply does not exist. See, e.g., American Psychiatric Association, Task Force Report on the Clinical Aspects of Violent Individuals 28-30 (1974); Rubin, Prediction of Dangerousness In Mentally Ill Criminals, 27 Arch. General Psychiatry 397 (1972); Proposed District of Columbia Omnibus Crime Bill: Hearings On S.2601 Before

the Senate Committee on the District of Columbia, 91st Cong., 1st Sess. 31 (1969) and 2d Sess. 2153 (1970) (comments of Judges Wald and Green); Monahan, The Prediction of Violent Behavior in Juveniles 10-11 (paper presented at National Symposium on the Serious Juvenile Offender in Minneapolis, Sept. 19-20, 1977, quoted in Feld, Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions, 62 Minn. L. Rev. 515, 541-542 (1978); Schlessinger, The Prediction of Dangerousness in Juveniles: A Replication, 24 Crime & Delinquency 40, 47 (1978); Cocozza & Steadman, The Failure of Psychiatric Predictions of

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Preventive Justice In the World of John Mitchell, 56 Va. L. Rev. 371 (1970); Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa. L. Rev. 439 (1974); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins In the Courtroom, 62 Cal. L. Rev. 693 (1974); Steadman & Cocozza, Psychiatry, Dangerousness and the Repetitively Violent Offender, 69 J. Crim. L. & Criminology 226, 229-231 (1978).

Predictions can, of course, still be attempted and may even be properly considered in cases such as that presented by Barefoot. They cannot, however, form the basis of a regulatory purpose such as the prevention of crime, which,

according to the Edwards court, does not amount to punishment when it takes the form of secure pretrial confinement. Contra, Campbell v. McGruder, 580 F.2d 521, 530 (D.C. Cir. 1978) ("pretrial detention itself is indistinguishable from punishment...").

Another departure from the case at bar lies in the fact that the statutory scheme challenged in Edwards contained limitations upon who could be preventively detained. In the District of Columbia, preventive detention could only be imposed upon a formal determination by the judicial officer ordering detention that there exists probable cause to believe the accused

committed one of the statutorily enumerated "dangerous crimes" or "crimes of violence". In that Amicus for Appellees believes that any period of secure confinement prior to trial which is based upon a prediction of future delinquency is unconstitutional per se, the narrowing effects which the District of Columbia statute may have will not be addressed. That statute's narrowing provisions do, however, provide some cure for the vagueness and unbridled discretion which the Appellees and Amici for the Appellees contend is unconstitutional in the New York statute.

The court in People ex rel. Wayburn v. Schupf, considered the

same provisions of the then existing New York juvenile code at issue here, and concluded that they were not violative of a juvenile's equal protection or due process rights. The Wayburn court did not engage in an analysis of whether preventive detention amounted to punishment however. Rather, the court focused on the distinctions between the adult criminal justice system and the juvenile court process. Preventive detention of juveniles was held to be constitutional because, in the eyes of the Wayburn court, "there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult

charged with crime will do". 350 N.E.2d at 909. The Wayburn court believed that since juveniles were less mature and less likely to comprehend the seriousness of their potential pretrial criminality, the state was more than justified in locking them up in order to protect them from their own "folly". Id. The Wayburn court, however, commits the same error that the Edwards court did regarding the predictability of future criminality, stating that "[t]he predicate which triggers the discretionary authority [to detain] under the statute is a finding that there is a serious risk that the juvenile charged with delinquency may commit another criminal act -an objective

fact." 350 N.E.2d at 908 (emphasis added). A determination that a "serious risk" exists is not an objective fact; it is a guess, and a guess which no one has argued can be made with any degree of reliability. See authorities cited at page 28, supra. Judge Tuchsberg, concurring in the result in Wayburn would have held the statute unconstitutional on this basis:

> Choices among juveniles as to who is a risk and who is not are thus essentially random and inexplicable in terms of any articulated and validated behavioral criteria. Such a procedure is inherently arbitrary and violative of due process.
>
> * * * *
>
> Of course, I share the majority's deep concern about the escalating incidence of violent crime, regrettably

> committed by children as well as adults. But suspension of the right not to be punished before one is found guilty is not a permissible solution, if it is any solution at all.

350 N.E.2d at 911-912.

In the very literal sense, it is of course possible to make a pronouncement predicting future criminality. That prediction, however, has only the remotest possibility of being accurate. By allowing such predictions to form the basis for a massive curtailment of personal liberty, it is extremely likely that the fundamental right to liberty is thereby being erroneously deprived. Under the test set forth in Mathews v. Eldrige, 424 U.S. 319, 335 (1976), the risk of erroneous deprivation of the fundamental

right to liberty which the practice of preventive detention imposes far outweighs the state's interest in protecting society and the accused child. Furthermore, while these state interests are indeed legitimate they cannot be constitutionally promoted through a procedure which punitively incarcerates a juvenile prior to an adjudication of guilt based upon crimes which have not even been committed.

II. Preventive Detention Does Not Promote Any of the Unique and Beneficial Goals of the Juvenile Justice System.

Appellants and Amici for the Appellants have intimated that preventive detention is a critical component of the juvenile justice system's rehabilitative procedures and that if the practice remains outlawed, the continued existence of the juvenile justice system will be jeopardized. Amicus for Appellees suggests that just the opposite is true. Removing a child from his family and the community and incarcerating him in a secure detention facility can in no way be considered rehabilitative or beneficial to the child.

Additionally, when such punishment is imposed for transgressions of the law which the child has not committed, the juvenile can hardly be expected to develop a healthy respect for our system of laws nor to develop a system of internal controls necessary to becoming a law abiding citizen.

Amicus for the Appellees agrees with the Appellants and their Amici that due process within the juvenile court system is to be measured by the "fundamental fairness" standard articulated by this Court in In re Gault, 387 U.S. 1 (1967), In re Winship, 397 U.S. 358 (1970), and McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Amicus for the Appellees is

somewhat at a loss, however, in understanding how a statute which imposes punishment prior to an adjudication of guilt, based upon crimes which the detainee has not committed, can possibly be considered fundamentally fair.

Appellants and Amici for the Appellants furthermore assert that what is fundamentally fair for due process purposes are those procedures which do not infringe upon the juvenile court's unique, informal and beneficial aspects. Their claim is that a procedure which provides for the secure confinement of juveniles awaiting trial promotes the flexibility, informality and rehabilitative care and treatment aspects of the

juvenile justice system, and that locking up the child is truly necessary to promote the child's own best interests. We would do well at this point to remember the state of affairs within the juvenile justice system which prompted this Court's decisions in cases such as McKeiver v. Pennsylvania.

> In theory the Court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law-knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's. In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there

> is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it was to concentrate on each case the best of current social science learning. In fact it has often become a vested interest in its turn, loathe to cooperate with innovative programs or avail itself of forward-looking methods.

403 U.S. at 544, n.5 (emphasis added). Amicus for the Appellees respectfully suggests that only the Appellants' "best interests" are being promoted by the challenged statute.

Amicus for the Appellants, a coalition of state attorneys general, insist however that preventive detention is fundamentally fair and in the Appellees' best interest for a number of reasons. They assert

that once a child is accused of a delinquent act, pretrial detention prevents the juvenile from embarking on a "downward spiraling pattern" of delinquent behavior; it operates to "spare the child additional rehabilitation or punishment, and aid the child in maturing into a law abiding citizen." Brief of Amicus Zimmerman, et al., for the Appellants at 21. In addition to noting with interest the reference to "further punishment" being avoided through the use of preventive detention, punishment which Appellants argue does not exist within the statutory scheme, Amicus for the Appellees questions how the asserted goal of preventing

further contacts with the juvenile court system is accomplished by confining the Appellee within that system's secure detention facilities rather than placing the Appellee within the community where he could be provided with counselling, supervision or other forms of pretrial services. In essence, Appellants and Amici for the Appellants claim to be saving the Appellees from the spectre of future punishment which would be imposed through confinement in a state training school by their parens patriae decision to detain the Appellees prior to trial in a local secure detention center. When followed to its somewhat perverse conclusion, this "best

interest of the child" argument would seem to allow for the secure confinement of all children until the age of majority in order that they may be prevented from engaging in delinquent behavior and embarking on the road to personal ruin.

In conclusion, Amicus for the Appellees submits that none of the juvenile court's "unique benefits" will be undermined by a ban on the use of preventive detention. Permitting the pretrial release of juveniles, subject only to adequate assurances that they will appear at their adjudicatory and, if necessary, dispositional hearings, will not diminish the flexibility and informality of the court, nor

will it in any way interfere with concerns for privacy and confidentiality of proceedings. Most importantly, as pointed out above, there is no apparent reason why pretrial release should hamper the court's ability to seek rehabilitation of its youthful offenders. In any event, under no circumstances may the court undertake to rehabilitate any juvenile before it until his guilt or innocence on the underlying charges has been determined.

Amicus for the Appellees urges that the opinions and orders of the courts below be upheld for their refusal to carve out of our system of justice a veritable due process netherworld into which our nation's

youth would be relegated. When stripped of their rhetoric, the arguments presented by the Appellants and Amici for the Appellants call for a return to the era of "child as chattel", when the mere invocation of the phrases "parens patriae" and "best interests of the child" justified the deprivation of a juvenile's rights, including those rights at stake here. This justification for denying Appellees certain constitutional rights was laid to rest by this Court nearly twenty years ago. In re Gault, 387 U.S. at 21. It should not now be resurrected from its questionable past.

Conclusion

For all of the above stated reasons, Amicus for the Appellees respectfully prays that this Court affirm the opinion and order of the Court of Appeals for the Second Circuit.

Respectfully submitted,
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Nos. 82-1248, 82-1278

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees,

On Appeal From the United States
Court of Appeals for the
Second Circuit

BRIEF FOR AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (hereinafter referred to as "NLADA") is a not for profit organization whose primary purpose is assistance in the provision of effective legal services to persons unable to retain counsel because of their indigency. Its membership includes the great majority of public defender offices, co-ordinated assigned counsel systems, and free legal services agencies throughout the United States. NLADA also includes 2,000 individual members, most of whom are private practitioners.

NLADA joins appellee in seeking affirmance of the decision of the United States Court of Appeals for the Second Circuit that the New York State statutory scheme and practice authorizing pretrial detention of juveniles violate the due

process clause of the Fourteenth Amendment since the statute is used principally to impose punishment for unadjudicated delinquent acts and not for preventive purposes. Because its members represent vast numbers of juveniles in delinquency proceedings nationwide, NLADA is keenly aware of the risks and errors in the pre-trial detention decision-making process as well as the conditions of confinement once a young person is so detained. In fact, NLADA members have often brought litigation on behalf of the juveniles detained in these facilities. NLADA wishes to bring to the court's attention the facts concerning the conditions in detention centers in which juveniles are held.

Both parties have provided consent to the filing of this brief.

SUMMARY OF ARGUMENT

This court has regularly ruled that constitutional rights apply to juveniles. These rights include the due process right to personal liberty. Intervenor-appellant and amici supporting reversal suggest that a juvenile's liberty interests are of less significance because of the substantial benefits a child receives while in pre-trial detention. The facts of life in pre-trial detention for juveniles is quite different from that environment suggested by the parties and organizations seeking reversal. Detention centers, like jails, are often punitive places. They may lack medical services, educational programs, recreational facilities and counseling resources. Physical conditions violate myriad building, health and safety codes and regulations. Children may be held in

isolation, and may be deprived of access to telephone, mail and personal contacts with family, friends and attorneys. Detention centers are often inhuman places that do great harm to the juveniles detained in them.

ARGUMENT

Conditions of Confinement for Juveniles Held in Pre-Trial Detention Centers Throughout the United States are Unnecessarily Punitive and Harmful

This court has repeatedly recognized that juveniles, both in the juvenile court process and in other court proceedings, have constitutionally protected rights, including the right to due process of law in order to protect liberty interests. In Re Gault, 387 U.S. 1 (1967); Breed v. Jones, 421 U.S. 519 (1975) and In Re Winship, 397 U.S. 358 (1970). Although recognizing that constitutional protections apply to juveniles and more specifically agreeing that juveniles have a liberty interest which is protected by the due process clause of the Fourteenth Amendment, the Intervenor-Appellant and amicus curiae attorneys general raise the proposition that this liberty interest may

be compromised in order to help children [Brief of Intervenor-Appellant Attorney General of the State of New York at page 36, n. 1]. In his amicus curiae brief, the Attorney General of the State of Pennsylvania argues at page 21 that "by the use of preventive detention in cases in which it is likely that the child will soon commit another crime, the juvenile justice system seeks to break the pattern, spare the child additional rehabilitation or punishment, and aid the child in maturing into a law-abiding citizen." The Attorney General of the State of New York argues that a juvenile's transfer from the custody of his parents to the custody of a local detention agency pursuant to New York State law "involves only questions of degree, not kind." (Intervenor-Appellant's Brief, page 36, n. 1.) The attorney general also describes secure detention in

New York as a self-contained facility making available education, recreation, meals, counseling and medical care on the premises. Id. at 11, n. 3.

This argument is both subtle and incorrect. As the following analysis demonstrates, detention facilities throughout the United States are anything but beneficent. The same is true for jails where juveniles are detained in equally large numbers. For a full analysis of conditions in jails, the court's attention is respectfully directed to the brief amicus curiae of the Youth Law Center of San Francisco in support of appellees.

The history of pre-trial detention in the nation's juvenile detention facilities is described in substantial detail in books and studies as well as in recent litigation in the federal courts. In

1979, 451,810 juveniles were admitted to detention centers nationwide. General Accounting Office Report to the Attorney General and the Secretary of the Interior. Improved Federal Efforts Needed to Change Juvenile Detention Practices (March 22, 1983). The GAO report analyzed five state systems and concluded that often questionable detention still occurred, most detained females were not charged with serious offenses, a substantial portion of juveniles were detained for long periods of time, and in many instances the standards for conditions in juvenile detention facilities promulgated by the National Advisory Council to the Office of Juvenile Justice were not met. The GAO found that "[d]uring our visits, State and local officials attested to the negative effects of long detention stays. According to the officials, one of the

major problems associated with long stays involved the concept of "lost time" -- time spent in secure detention that does not reduce the time subsequently spent in treatment programs. Juveniles realize this and become frustrated and anxious for quick resolution of their cases. The officials said that this frustration is often heightened because for many juveniles, parents, friends, and court counsellors rarely visit or phone." GAO Report, page 12. This conclusion stands in stark contrast to the suggestion of intervenor and amicus that such detention facilities help children.

The repugnant and often times constitutionally defective nature of detention centers has been graphically described in both court decision and popular literature. One such example is the New York City detention facility

wherein the plaintiffs/appellees in this case were housed. Spofford, as it is commonly known, or in prior times the "youth house," has been in continuous operation since 1958. It has been the topic of virtually continuous controversy over such issues as conditions and location for this entire period. See L. Cole, Our Children's Keepers (Fawcett, 1972). It has been the subject of repeated public studies and investigations. See generally An Inquiry Into the Juvenile Centers Operated by the Office of Probation, a Report Issued by Joseph Stone, Chairman, Submitted to the Appellate Division of the Supreme Court, First and Second Judicial Departments (January 1971); Citizens Committee for Children of New York, Juvenile Detention Problems in New York City, New York (1970). Report of the Committee on Public

Safety: Spofford Juvenile Detention Center, the City Council of New York (April 1978); Mayor's Task Force on Spofford: First Report (June 1978).

The terrible circumstances found there finally became the subject of federal court litigation in the mid-1970's. Martarella v. Kelley, 349 F. Supp. 575 (1972); 359 F. Supp. 478 (1973). In a sweeping decision concerning conditions in the three detention facilities then existing in New York - Spofford as well as Zerega and Manida - the federal court applied constitutional protections to the juveniles in those facilities.

Martarella actually was a challenge to conditions of confinement of status offenders, known in New York as persons in need of supervision (PINS). However, as the court noted in its second decision,

the standards of treatment for PINS would be the same for the delinquent children with whom the PINS were housed at the center even though the delinquents were not included in the plaintiff class. Martarella at 481, n. 1. In the court's first opinion it described the conditions in substantial detail, citing repeatedly from the trial record.

> It will be noted that all of centers are located in the East Bronx. Since they are the only detention centers in the city for PINS, their location in one corner of the metropolis makes it a long journey for many family visitors who come from Queens, Brooklyn and Staten Island, and acts to limit the actual number of visits which the children receive.

Martarella v. Kelley, 349 F. Supp. at 581.

The court went on to find that the facilities were punitive in nature, used restraints and discipline, lacked adequate treatment and staff training, and

therefore were constitutionally inadequate. Id. at 584-602.

The problems at Spofford did not end with the court opinions in Martarella nor with its Ombudsman's decision of March 26, 1975 in which the court ordered that an individual be hired to work at the facility and represent the interests of the detained juveniles. Martarella v. Kelley, 71 CIV 3130 (Order dated March 26, 1975). Subsequently, in 1978, the New York City Council Safety Committee conducted an inquiry into conditions at Spofford and issued a report in which it found that "security is difficult to attain, the experience for the youths is depersonalizing and traumatizing and the costs are excessively high." Report of the Committee on Public Safety: Spofford Detention Center, the City Council of New York at 12 (April 1978). The committee

then concluded that the facility must be closed. Since that time, the current Commissioner of Juvenile Justice of the City of New York and her predecessor have sought to decentralize pre-trial detention and reduce the numbers of juveniles held in the city's facilities.

New York City, of course, is not the only municipality whose juvenile detention center for pre-trial detainees has been the subject of extensive federal court litigation. The same is true of Philadelphia.

Santiago v. Philadelphia, 435 F. Supp. 136 (1977); 72 F.R.D. 619 (E.D. Pa. 1976) was a civil rights action brought by juvenile residents of the Youth Study Center in Philadelphia who challenged conditions of confinement and treatment as pre-trial detainees. After making two preliminary rulings on class certification

and a motion to dismiss, the court approved a stipulation and partial settlement in December of 1978. The elements of that settlement are significant and substantial. They include protections concerning mail and telephone usage, hours and circumstances of visitation, dress and personal property, recreation, medical services, physical and psychological abuse, isolation, diet, sanitation, safety and hygiene, and physical facilities and environment.

These conditions were not far removed from those described in 1970 by Lois G. Forer in a popular piece of literature concerning the Pennsylvania juvenile court system. L.G. Forer, No One Will Listen (Grosset's Universal Library, 1971) at 106-134.

The lack of special benefits to juveniles resulting from detention and in

stark contrast, the onerous and often repugnant conditions in these detention centers, are further demonstrated in a series of consent degrees resulting from federal court actions filed around the country. Thomas v. Mears, 474 F. Supp. 908 (E.D. Ark. 1979), was a class action challenge to procedures employed and conditions maintained at the Pulaski County, Arkansas juvenile detention center which facility services the city of Little Rock. The omnibus decree contains a substantial segment directed to types and conditions of confinement. It governs such basic necessities as allowing the children to wear civilian clothes. Children are to be allowed daily visits from their families and attorneys. The children held in secure detention shall be allowed out of their cells during the day, may use toilet facilities outside their

cells, may get their meals outside their cells, and may attend classes if detained for more than five days. Those held for more than twenty-four hours will have an opportunity to engage in recreation outside their cells. Recreation, pursuant to the decree, includes at least two hours of daily outdoor recreation weather permitting and includes such indoor activities as watching television, ping pong, card games, weight lifting, and the like. Thomas at 911-912. Finally, the defendant public officials agreed to seek appropriate funding to renovate, reconstruct and improve the physical plant of the detention center.

An equally extensive consent decree was entered in Inmates of Judge John J. Connelly Youth Center v. Dukakis, No. 75-1786-G (D. Mass. 1976), a case concerning the Roslindale, Massachusetts

detention facility. In that case, the decree covered such diverse matters as mail, telephone use, visitation, access to legal assistance in the courts, dress and personal property, education and treatment programs, exercise and recreation, medical services, mental health care, physical, psychological and verbal abuse, isolation, diet, staff, sanitation, safety and hygiene, grievances, and monitoring and reporting. The limitations on personal freedom in this facility which required correction through litigation were multitudinous. For example, detainees were to be provided with clothing purchased by the facility but which would be equivalent to that worn by most adolescents. Schooling was to be provided in a tutorial program which would include remedial instruction. This meant that each detainee would receive four hours of

educational instruction per day with at least two hours of academic subjects. A minimum of two hours of outdoor recreation on school days and a minimum of four hours on non-school days was provided. There was to be additional indoor recreation. The consent decree provided that each detainee would be examined by a registered nurse or doctor within twenty-four hours of admission and at intervals of four months or less thereafter. The parties agreed that there would be twenty-four hour emergency medical, psychiatric and dental treatment. The defendants agreed not to deprive the detainees of meals nor to engage in corporal punishment. The defendants agreed to give each detainee a clean mattress, blanket, sheet, pillow case, towel, pillow, soap, toothpaste and toothbrush. Towels were to be changed twice per week. It was agreed that the

toilets and lavatories would have partitions.

A similarly extensive consent decree was entered just a year ago by the United States District Court for the Western District of Washington in Clarence M. v. Board of County Commissioners of Yakima County, et al., No. C-78-166 (E.D. Wash. 1982). This was a civil rights action challenging the conditions of confinement at the Yakima County Juvenile Detention Center in the State of Washington. The decree governed a panoply of conditions. For example, the defendants agreed to obtain the services of a qualified fire and safety officer to review all policies and procedures related to safety and fire prevention. Automatic fire alarm and heat and smoke detention systems were to be installed. Children were to be provided with clothing. They were to be provided

with stationary, envelopes and postage for mailing of letters and outgoing mail was not to be opened or read. Telephone calls were permitted as was a daily two-hour supervised visitation period. Each juvenile was entitled to one shower daily. Showering was to be protected from view from members of the opposite sex. Detention officers of the same sex were to perform the duties of body searches and pat down searches and assist the nurse if required. A program of indoor and outdoor exercise and recreation as implemented. Overcrowding was outlawed. Physical, psychological or verbal abuse by staff was prohibited. This included such actions by the staff as taunting, threatening discipline, swearing, racial slurs, and providing misinformation to juveniles. Limits were placed on isolation. Medical and mental health services were to be

provided pursuant to a contract entered into with a health provider. One hundred eighty days of school were provided as required by Washington state law.

The Los Angeles County Central Juvenile Hall has also been the subject of litigation over conditions of detention confinement. In Manney v. Cabell CV 75-3305-R (C.D. Cal., 1979), rev'd on other grounds, 654 F.2d 1280 (1981), cert. denied, sub nom. Manney v. Fare, 455 U.S. 1000 (1982), the federal district court went through the same litany of abuses as had the other federal courts. The court entered an order concerning overcrowding, hygiene, medical care, staff policies and procedures, psychiatric care, and medication. Some of the required changes included permitting juveniles to take a shower at least once per day, medical screening, and provision of appropriate

diets for those juveniles in need.

Finally, in one recent instance, a detention center was simply closed as a result of federal court litigation. In Aguilar v. Mitchell, C-77-254 (E.D. Wash., September 28, 1981) and after a trial to the court, the court ordered the Walla Walla County juvenile detention facility to be closed except for a very limited situation. The defendants could hold children when they were returned from another juvenile institution or detention facility for the purpose of making a court appearance or conferring with counsel, personal visitors, probation officers or other court related individuals. However, even under these circumstances, the children could not be confined for more than eight hours. They could not be held overnight and could not be held without constant supervision as conditions in the

detention center were just too inadequate.

CONCLUSION

For these reasons amicus urges that the judgment appealed from should be affirmed in all respects.

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Nos. 82-1248, 82-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELLEN SCHALL, Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, Attorney General of the State of New York,

Appellants

v.

GREGORY MARTIN, *et al.*,

Appellees

On Appeals from the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES

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BRIEF OF AMICUS CURIAE, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The Public Defender Service for the District of Columbia offers this brief as amicus curiae in support of Appellees.

The Public Defender Service is an agency of the District of Columbia providing legal representation to indigent persons charged with crimes in the District. One section of the Service is devoted exclusively to representing juveniles. Each year the agency represents hundreds of juveniles charged with serious acts of delinquency.

The District of Columbia, along with other jurisdictions, has statutes and rules authorizing preventive detention of juveniles charged with delinquent acts. As is true in all other jurisdictions, there is no bail system for juveniles—they are either released or detained pending trial.

The Court's decision in the present case will have a significant impact on amicus and the hundreds of juvenile clients represented each year. The District of Columbia statute and rules provide some, but insufficient limits on judicial discretion in making detention decisions. The New York statute, however, is even a cruder tool for predicting future criminal activity. Reversal of the Second Circuit decision in this case would foreclose consideration of more sophisticated detention schemes, such as the one used in the District of Columbia.

Examination of the District of Columbia juvenile detention statute and rules puts in context the New York statute and makes clear its constitutional shortcomings. The Public Defender Service submits this brief to show that the New York preventive detention statute violates due process.

SUMMARY OF THE ARGUMENT

The New York juvenile preventive detention statute permits the pretrial detention of juveniles charged with acts of delinquency only on both a finding of probable cause and a finding that unless detained, there is a "serious risk" the juvenile would commit another crime before the next court hearing. This simplistic statute violates due process.

The liberty interests at stake in a detention hearing are fundamental. Yet in practice, a detention hearing is a hurried review of incomplete and inaccurate information regarding a child's home, school, employment and juvenile record. Moreover, predictive judgments of criminal activity are notoriously unreliable under the best of conditions.

Due process requires procedures that will reduce the unacceptably high risk of error in detention hearings. At a minimum, a preventive detention statute should provide criteria for detention decisions so that rulings are not made on whim or caprice; written notice of the allegations supporting detention, with some opportunity to prepare for the hearing and controvert the allegations; and a requirement that detention is permissible only if the judge finds by "clear and convincing evidence" that release would present a serious risk of additional crime. The New York statute provides none of these procedural safeguards, and thus violates due process.

ARGUMENT

THE NEW YORK JUVENILE PREVENTIVE DETENTION STATUTE VIOLATES DUE PROCESS BECAUSE IT PROVIDES INADEQUATE PROCEDURAL SAFEGUARDS IN DECIDING THE APPROPRIATENESS OF PRETRIAL DETENTION

Section 320.5(3) of the New York Family Court Act allows preventive detention of juveniles charged with delinquency so long as a judge makes two findings: (1) that there exists a "serious risk" that the juvenile will commit another offense while pending trial; and (2) that there is probable cause to believe the juvenile committed the present offense.[1] In making the first finding, the judge's discretion is completely unguided; he has no statutory standards or rules from which to decide whether a juvenile's release would present a "serious risk" of additional crime. Nor is the judge given the standard of proof required for a finding of "serious risk."

Other jurisdictions permit preventive detention of juveniles charged with acts of delinquency. The District of Columbia, for example, uses a combination of statutory

---

[1] The second finding need not be made until the juvenile has been detained for five days.

provisions and court rules requiring a judge to make certain findings before he can order preventive detention. While the District of Columbia scheme is analogous to the New York statute in that it permits preventive detention of a juvenile based on a judge's finding that the juvenile will commit a crime if released, the finding is guided by certain factors that are deemed to be relevant.

The District of Columbia preventive detention scheme for juveniles is far from perfect. It raises many difficult questions regarding the constitutionality of preventive detention, including the sufficiency of the criteria and the process available, and the accuracy of predictions of future dangerousness based on scanty and often inaccurate information. The New York statute, however, is so far inferior to the District of Columbia framework that the constitutional questions are more easily answered: as presently designed, the New York preventive detention statute for juveniles violates due process.

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Supreme Court set forth the basic analytical framework for deciding whether governmental procedures are constitutionally sufficient:

> "our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

See also Santosky v. Kramer, 445 U.S. 745, 754-55 (1982). While *Mathews* involved the adequacy of governmental procedures for terminating Social Security disability benefits, the analysis is equally applicable to

governmental procedures for denying an individual his liberty.

There is no dispute that preventive detention of juveniles implicates important due process concerns. Whether or not preventive detention is characterized as punitive,[2]

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[2] In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court held that certain conditions of confinement, necessitated by the pretrial detention of adults who were unable to post bond, were not punitive. At the same time, the Court held that any form of punishment imposed before trial would, of course, be a denial of due process. Because it was not presented, the Court reserved decision as to whether or not detention to ensure community safety, as opposed to an accused's appearance at trial, was punitive or non-punitive in nature. *Id.* at 534 n.15.

In *Bell* the Court identified certain tests traditionally used in determining whether governmental action is punitive:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted)."

Bell v. Wolfish, supra, 441 U.S. at 537-38.

Application of these tests strongly suggests that preventive detention is punitive in nature. Detention is an affirmative restraint, and incarceration for the purpose of protecting the community from criminal acts historically has been viewed as punishment. *Powell v. Texas*, 392 U.S. 514, 539 (1968) (Black, J., concurring). Preventive detention is based on a finding of *scienter* in that it requires a conclusion that the juvenile will willfully violate the law. Finally, incapacitation traditionally has been considered one of the aims of the penal system (the others being rehabilitation, retribution and general deterrence). *See United States v. Brown*, 381 U.S. 437, 458 (1965); *Specht v. Patterson*, 386 U.S. 605, 608-09 (1967).

These fundamental and troublesome issues need not be decided in the present case, however, because if *any* system of pretrial detention designed to ensure community safety could pass constitutional muster, it is not the New York statute.

the effect on the juvenile is as if he were being punished for a crime. A detained juvenile will lose his employment or be forced to leave school, suffer indignation and stigma, and be taken away from family and friends. Additionally, as various studies have concluded, a juvenile who is detained stands a greater chance of both being convicted and receiving a commitment to a juvenile institution following conviction. *See* Ares, Rankin and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67, 86 (1963); Vera Institute of Justice, Programs in Criminal Justice Reform: Ten-Year Report 1961-1971, at 31 (1972). Thus, juveniles have a substantial interest in remaining free pending trial. Moreover, as the Court repeatedly has made clear, liberty—freedom from physical restraint—is fundamental in our constitutional scheme. In *Stack v. Boyle*, 342 U.S. 1, 4 (1952), the Court stated, in a slightly different context:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (citation omitted).

These concerns, which derive directly from the Bill of Rights, are illustrative of the fundamental interest in protecting the individual from the potential for injustice that lurks in the government's use of its massive power to enforce the law.

Even if the government has, under certain circumstances, a legitimate interest in using preventive detention to protect the community from juveniles who may commit crimes while on pretrial release, the government has an equally important interest in assuring that procedures are fair, and that detention decisions are based on

accurate findings.[3] And surely the government has no interest in the erroneous pretrial detention of juveniles.

In determining what process is due, it is not enough to identify the importance of the interests at stake; it is also necessary to gauge the risk of error in existing procedures. Preventive detention necessarily involves a substantial risk of error. Detention decisions require a predictive judgment regarding future conduct that is based on scanty, and often inaccurate information. Moreover, as study after study have concluded, predictions of future criminal behavior are extremely unreliable. The American Psychiatric Association, for example, has stated, "neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or 'dangerousness.'" American Psychiatric Association, Task Force Report on the Clinical Aspects of Violent Individuals 28 (1974). *See* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U.Pa. L. Rev. 439 (1974); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 Arch. Gen. Psychiatry 397 (1972); Megaree, *The Prediction of Violence With Psychological Tests*, Speilberger, ed., Current Topics in Clinical and Community Psychology (1970). Moreover, juvenile detention decisions are made quickly, with only a cursory review of the information. There is no opportunity to verify or controvert the information relied on by the judge. Given the unreliable data base, and the inherent unreliability in predicting future dangerousness, it is hardly surprising that the risk of error in detention decisions is great. Under these circumstances—enormous risk of error and importance of the

---

[3] The government also has an interest in ensuring that the juvenile appears for trial. *See Stack v. Boyle*, 342 U.S. 1, 4-5 (1951). That interest is addressed in both the New York and District of Columbia juvenile preventive detention laws. However, that provision was not challenged below, and its legitimacy as a basis for pretrial detention is not before the Court.

interests at stake—due process requires safeguards that will reduce the risk of error to acceptable levels.

The New York juvenile preventive detention statute affords no protections to reduce the risk that a juvenile will be detained erroneously pending trial. The New York statute states simply and simplistically that:

> "The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:
>
> . . .
>
> (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime." Section 320.5(3), New York Family Court Act.

As is apparent, the statute makes no provision (1) for criteria to guide a judge's detention decision; (2) for notice of the allegations on which the government is relying in seeking detention; (3) for the standard of proof by which a judge must conclude that release would pose a "serious risk" of additional crime. The absence of any one of these factors leaves the New York statute constitutionally deficient.

The New York statute violates due process because it provides utterly no basis for a judge to make a detention decision. Each exercise of judicial discretion, in making a notoriously unreliable prediction of future criminal behavior, is without legislative guidance or limits, and is thus effectively unreviewable. Absent any legislatively recognized criteria for predicting recidivism, a juvenile court judge in New York is free to make detention decisions on whim. The result is inconsistent and conflicting detention decisions; factors that one judge may feel create a serious risk of crime may make no impression on another judge.

The preventive detention statute need not be so broadly constructed. For example, in the District of Columbia,

judges are guided by specific factors deemed relevant in making the detention decision. The basic statutory provision for detaining juveniles charged with delinquency is found in 16 D.C. Code § 2310(a):

> "(a) A child shall not be placed in detention prior to a factfinding hearing [a trial] or a dispositional hearing [a sentencing hearing] unless he is alleged to be delinquent . . . and unless it appears from available information that detention is required—
>
> (1) to protect the person or property of others or of the child, or
>
> (2) to secure the child's presence at the next court hearing."

A finding that detention is necessary for any one of these four criteria is sufficient to detain the child.[4]

The District of Columbia statute provides that these basic criteria are to be implemented by the Superior Court Rules. 16 D.C. Code § 2310(c). Rule 106(a) separately addresses each of the four criteria listed in section 2310(a), setting forth "factors" to be considered by a judge before he can find detention to be "necessary." Rule 106(a)(1) deems relevant six factors in deciding whether detention is "necessary" to protect other persons:

> "(i) Record of child's previous offenses against persons,

---

[4] Three of the four statutory criteria address the two criteria listed in the New York statute. The first two criteria—protection for either the persons or property of others—are roughly analogous to the New York criterion of "serious risk" of criminal activity before trial. The fourth criterion—securing the juvenile's presence at the next hearing—is similar to the first criterion under the New York statute. The remaining criterion—protecting the child—is not addressed by the New York detention statute. In practice, this criterion is rarely used by the District of Columbia Superior Court in deciding to detain a juvenile.

(ii) Record of child's previous weapons offenses,

(iii) Nature and circumstances of the pending charge,

(iv) Nature and circumstances of other pending charges, if they involve an offense against the person or a weapons offense,

(v) Allegations of danger or threats to witnesses, and

(vi) Emotional character and mental condition of the child."

Rule 106(a)(2) lists three factors in deciding whether detention is "necessary" to protect the property of others from "serious loss or damage":

"(i) Record of child's previous offenses against the property of others, if serious loss or damage was involved,

(ii) Nature and circumstances of the pending charge, and

(iii) Nature and circumstances of other pending charges, if they involve serious loss or damage to the property of others." [5]

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[5] The other two statutory criteria, protection of the juvenile himself and ensuring his presence at the next hearing, do not involve predictions of future criminal activity. Rule 106(a)(3) refers to four factors in protecting the child:

"(i) Narcotics addiction by child or other severe and chronic drug abuse,

(ii) Severe and chronic alcoholism of the child,

(iii) Suicidal actions or tendencies of the child, and

(iv) Other seriously self-destructive behavior creating an imminent danger to the child's life or health."

Rule 106(a)(4) lists seven factors in determining whether detention is "necessary" to ensure the child's presence at the next hearing:

"(i) Child's residence in the District of Columbia,

(ii) Length of child's residence and present community ties,

[Footnote continued on page 11]

As Rule 106(a) illustrates, a judge in the District of Columbia is guided by numerous, specific factors in deciding whether detention is "necessary." Rule 106 identifies as relevant the nature and circumstances of the present charge; the nature and circumstances of pending charges that involve either "serious loss [of] or damage" to property, weapons, or crimes against persons; the juvenile's record of convictions that involve "serious loss [of] or damage" to property, weapons, or crimes against persons; allegations of threats to witnesses; and the emotional and mental condition of the child. In the District of Columbia, unlike in New York, a court may not detain an alleged child on mere whim.[6]

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[5] [Continued]

(iii) Employment record of the child,

(iv) Record of child's appearances at prior court hearings and circumstances surrounding non-appearances, if any,

(v) Record of child's previous abscondances from institutions or official custody, and circumstances surrounding such abscondances,

(vi) Record of child's abscondances from home, and circumstances surrounding such abscondances and the child's eventual return home, and

(vii) Seriousness of the pending charge and its likelihood of inducing non-appearance."

[6] The enormous breadth of the New York statute is made manifest when one considers that it permits pretrial detention regardless of the present or past offenses, and regardless of the crime the child may commit before his trial. Thus, a judge in New York could detain a juvenile for a minor property crime if he concluded, based on the child's failure to hold a job, that there was a serious risk of future petty crime.

While the District of Columbia statute and rules do not list "detainable" crimes, there are some guidelines. Rule 106(a)(2) permits detention only when "necessary" to protect property from "serious loss or damage." In deciding whether future crimes may involve serious loss or damage, a judge can consider both the past record of property offenses and pending offenses, but only if they involve serious loss or damage.

Quite apart from legislative guidance for predicting criminal activity, neither the New York nor the District of Columbia preventive detention laws make any provision for written notice to the juvenile and his attorney of the allegations to be presented to the court for its detention decision. Such information is often unreliable and incomplete, gathered as it is only shortly before the court hearing and based on a cursory check of files or hurried interviews with the juvenile and his family. Because this information will be the basis for the court's decision to detain the juvenile, due process requires notice of the allegations, and an opportunity to controvert them.

Written notice has long been recognized as an essential component of due process. For example, prisoners facing disciplinary proceedings, *Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974), probationers facing revocation, *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), and parolees facing revocation, *Morrissey v. Brewer*, 408 U.S. 471, 486-87 (1972), are entitled to receive notice of the charges and facts alleged against them. It is inconceivable that a potential detainee, whose legally cognizable liberty interests are much greater than either those of a prisoner or the conditional liberty of a parolee or probationer, should not receive at least as much notice. "*A fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Bell v. Wolfish*, *supra*, 441 U.S. at 545.

Notice need not be a matter of days; generally, it would be sufficient, for purposes of checking the allegations and preparing for a hearing, if an attorney had a couple of hours. And each jurisdiction could create standard forms for listing the information to be presented at a detention hearing. It is difficult to believe that this sort of "bare bones" notice would pose any burden on the government, or that the government would have any legitimate interest in opposing release of that information two hours before a detention hearing.

Notice of and the opportunity to controvert allegations at the detention hearing are meaningless, however, if there is no standard of proof for the court's ruling. Neither the New York nor the District of Columbia juvenile detention statutes sets forth the standard of proof required in finding that release would pose a "serious risk" of crime (New York) or that detention is "necessary" to protect the persons or property of others (District of Columbia). This standardless discretion violates due process.

The standard of proof is a device "to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). *See also Santosky v. Kramer*, *supra*, 455 U.S. at 755. Thus, in most private civil damage suits, where "society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. at 423. In criminal cases, on the other hand, "the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Id.*

As noted above, preventive detention for juveniles is in many ways indistinguishable from incarceration following trial. In fact, as the findings of the lower courts made clear, for most juveniles, the pretrial incarceration was the *only* period of incarceration. Moreover, each detention decision is an enormously risky venture. No one can gainsay that the risk of error is high.

Under these circumstances, due process requires that the government, not the individual, bear a greater share of the risk of error by proving, at a minimum, by clear and convincing evidence that detention is required. Certainly, the state has a significant interest in protecting the community, and perhaps even a *parens patriae* interest in ensuring that the child does not harm himself by becoming further involved in criminal activity. Neverthe-

less, the individual juvenile's interest in avoiding pretrial incarceration and its collateral consequences, as well as the tremendous risk inherent in this sort of predictive judgment, require the state to adopt no less a standard of proof than that constitutionally required in civil commitment proceedings. *See Addington v. Texas, supra.* As this Court recently stated, "This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer, supra,* 455 U.S. at 756.

In many respects, the predictive judgment made by a judge in a preventive detention hearing is identical to the finding of "dangerousness" required in civil commitment proceedings. Both rely on data provided and interpreted by professionals (social workers in one case and psychiatrists in the other). Moreover, neither hearing is strictly a criminal proceeding, for in neither does the individual suffer the full stigma of a criminal conviction. And in both cases, a standard of beyond a reasonable doubt could defeat the government's interests since, given the uncertainty of such predictive judgments, the government would find it difficult to prove future dangerousness. *Addington v. Texas, supra,* 441 U.S. at 479.

The standard for arrest, and for parole and probation revocation, illustrate the importance of a clear and convincing standard for preventive detention. Probable cause, which permits a relatively high margin of error, is the standard for arrest because the deprivation of liberty is relatively small. Similarly, parole and probation violators, who have only conditional liberty, can be incarcerated on proof of only a preponderance of the evidence that they violated their conditions of release. By contrast, the juvenile's stake is higher—preventive detention is a significantly greater deprivation of liberty than arrest, and the potential detainee's liberty interest is substan-

tially greater than that afforded a parolee or probationer. Accordingly, at a minimum, the government must prove, by clear and convincing evidence every finding necessary for preventive detention.

CONCLUSION

For the foregoing reasons, the Amicus Curiae, the Public Defender Service for the District of Columbia, submits that the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE, TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION AND THE LEGAL FOUNDATION OF AMERICA

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NO. 82-1248
NO. 82-1278

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

V.

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

BRIEF OF AMICI CURIAE, TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION AND THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICI CURIAE

The Texas District and County Attorneys Association ("TDCAA") is a non-profit association of more than 1,000 elected district attorneys, county attorneys, and their assistants practicing in Texas. Its basic propose, as stated in the Bylaws of the Association, is to "promote the improvement of prosecution in Texas." TDCAA conducts regular continuing education programs in both civil and criminal law, and it publishes books on

subjects of interest to its members. It also takes public positions on matters significant to the enforcement of law.

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm, located on the campus of the South Texas College of Law in Houston. It shares certain personnel and activities with the law school.* Its goals include the preservation of a rational system of criminal justice. In pursuit of this goal, LFA has appeared as amicus curiae in this honorable Supreme Court, in federal appellate and district courts, and in the courts of various states, in criminal law matters. In particular, LFA has taken an interest in pretrial detention of dangerous offenders.**

Amici have an interest in the provision of the New York statute at issue here because amici are vitally interested in the preservation of the analogous Texas juvenile detention provisions, Tex. Fam. Code Ann. secs. 53.02, 54.01 (1976).*** Fur-

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* Amicus curiae wish to acknowledge, with thanks, the assistance of law student Mary Burke in the preparation of this brief.

** For example, LFA appeared as amicus curiae in this Court last term in Murphy v. Hunt, No. 80-2165.

*** A child may be detained prior to hearing if he is likely to leave the court's jurisdiction, if he is not likely to be provided with suitable care, if he has been accused of a felony and may be dangerous to himself or others, or if he was found previously delinquent or convicted of a punishable offense and is likely to commit another offense if released. Tex. Fam. Code, supra, sec. 53.02. A detention hearing must be held within two days after custody. The court considers reports from probation officers and professional consultants in determining whether the child can be released pursuant to the criteria in Tex. Fam. Code, supra, Section 53.02. A detention order is effective for no more than ten days. Tex. Fam. Code, supra, sec. 54.01. The procedure for such detention hearings is considered so onerous in relation to the relatively brief detention that can result from it, that such orders, in Texas, are not routinely sought, and are confined as a practical matter to serious offenses, clear repeat offenses, or juveniles without adequate support, lodgings or custodians.

ther, amici would respectfully urge the Court, in deciding this case, not to hold bail denial or preventive detention unconstitutional as a general proposition. There is valid reason for detaining certain dangerous or repeat offenders. The States vary in their statutes governing both juvenile and adult detention (Texas, for example, has three different detention categories applicable to adults).**** In a federal system, such diversity should be permitted.

STATEMENT OF THE CASE

Amici adopt the statement of the case made by Petitioners. Amici would emphasize that Respondents here were charged with (and shown by prima facie evidence to have engaged in) violent offenses that were by their nature likely of repetition and that circumstances (such as the giving of a false address, prior criminal record, etc.) corroborated the "serious risk" finding.

SUMMARY OF ARGUMENT

I.

The philosophy of juvenile justice is rooted in the common law doctrine of parens patriae. Colonial America imported this doctrine and extended it to include delinquents and criminal behavior. The history of juvenile detention shows that the concept was constitutionally acceptable to the drafters of the relevant constitutional language.

II.

Even if adult standards are applicable to juveniles, examination of the history of the "excessive bail" and due process clauses overwhelmingly indicates that the drafters did not regard these

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**** TEX. CONST. art. 1, secs. 11-11a (Vernon Supp. 1981) (capital cases wherein "proof is evident;" also, certain prior offenders on "substantial" proof of guilt); ex parte Jones, 460 S. W. 2d 428 (Tex. Crim. App. 1970).

provisions as a guaranty of a right to pretrial release. New York's approach is constitutionally acceptable in this regard, as is Texas'.

III.

This Honorable Court should not prefer a categorical evaluation by specific evidentiary "factors" to other statutory models for detention, including individualized evaluation. Any single model standing alone can introduce elements of judicial discretion that can in theory be abused. In a federal system, this honorable Supreme Court should allow different kinds of statutes to exist among the fifty States, and it should not attempt to decide which model is "best" or to impose that judgment upon the legislative branch.

ARGUMENT

I. JUVENILES HAVE NOT HISTORICALLY BEEN, AND SHOULD NOT BE, TREATED IDENTICALLY TO ADULTS WITH RESPECT TO DETENTION. THE UNDERSTANDING OF THOSE WHO DRAFTED THE CONSTITUTION WAS THAT JUVENILE OFFENDERS WERE MORE READILY DETAINABLE THAN ADULTS, FOR REASONS THAT REMAIN VALID TODAY.

The protective care of juveniles was founded in the parens patriae doctrine of common law England and adopted by colonial America. Under this doctrine, pretrial detention in America has never before been considered to deny juveniles due process, and it is inconceivable that the drafters of the fifth or fourteenth amendments intended otherwise.

A. The Parens Patriae Doctrine as Developed in England for Neglected and Dependent Children.

By the 16th century, urban migration resulted in congregation of "fatherless" unkempt children. The problem did not

abate with time and many poor vagrant children were living in the streets and perishing. Juvenile Offenders for a Thousand Years: Selected Readings from Anglo-Saxon Times to 1900 40 (W. Sanders ed. 1940). Poor laws were passed beginning in 1535 which appointed overseers to bind out destitute or neglected children as servants. Apprenticeship existed throughout almost the entire history of Britain. L. Siegal & J. Senna, Juvenile Delinquency: Theory, Practice, and Law 303 (1981) [hereinafter cited as Seigal].

The king invoked the doctrine of parens patriae (literally, "father of the country") to justify intervention into the lives of children whose position or property were of direct concern to the monarch. Siegal 304. He acted in loco parentis, "or in the place of a parent." M. Barron, The Juvenile in Delinquent Society 13 (1956). Through the system of equity, the king exercised his power of guardianship over the person and property of minors, who were considered wards of the state and entitled to special protection. R. Caldwell & J. Black, Juvenile Delinquency 187-8 (1971) [hereinafter cited as Caldwell]. This equitable system separated the delinquent child from his parents and circumvented criminal law by allowing courts to commit the child to special schools and not to jail. Siegal 308.[1]

The English chancery courts continued throughout the 18th and 19th centuries to exercise this jurisdiction. Lord Chancellor Cottenham in In Re Spence, 2 Ph. 247, said:

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1 See also, Shamburek, Comments—A Due Process Dilemma: Pretrial Detention in Juvenile Delinquency Proceedings, 11 J. Mar. J. Prac. & Proc. 513, 516 (Spring 1978) [hereinafter cited as Shamburek] (power in chancery courts for more informal proceedings); A. Coffey, Juvenile Justice as a System 36 (1974) [hereinafter cited as Coffey] (parens patriae and chancery courts ultimate basis of American juvenile court); S. Davis, Rights of Juveniles Juvenile Justice System 2 (1974); E. Eldefonso, Law Enforcement and the Youthful Offender 185-6 (1973) [hereinafter cited as Eldefonso]; C. Flammang, Juvenile Delinquency in a Free Society 131 (R. Winslow ed. 1973) [hereinafter cited as Winslow].

> The cases in which the court interferes on behalf of infants are not confined to those in which there is property . . . This court interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the crown as parens patriae.

See also In Re McGrath, 2 Ch. 496; Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909) [hereinafter cited as Mack].

The chancery courts in early England did not have jurisdiction over children who were charged with criminal conduct. They were handled within the regular criminal court system, which imposed harsh sentences similar to those for adults. Seigal 304.[2] There were no provisions for public institutions for juveniles until the Parkhurst Act in 1838. Caldwell 6.

B. Colonial America Imported the Parens Patriae Doctrine and Extended it to Criminal Acts.

The early American colonies became a haven for poor and unfortunate people, including children. As in England, the colonial child was still subject to adult procedures and punishments for criminal acts. Siegal 305.[3]

The transfer of the English legal system resulted in an extension of the activities of the chancery courts to protect children from personal danger as well as property injury. This extension of the chancery court's protective powers favors juvenile detention. Winslow 132. It becomes a basis for society to intervene in parent-child relationships. Flammang 124.[4]

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2 See also Mack, supra, at 106.

3 Accord, Caldwell, supra, at 6.

4 Accord, Coffey, supra, at 36-37.

The first juvenile institution, created in 1825, was the New York House of Refuge. In considering the power of a court to send a child to the House, Chief Justice Gibson in Ex Parte Crouse, 4 Whart. 9 (1938), said:

> May not the natural parents when unequal to the task of education, or unworthy of it, be superseded by the parens patriae, or common guardian of the community? . . . The right of parental control is a natural, but not an inalienable one. It is not excepted by the declaration of right out of the subject of ordinary legislation.

Mack 111. This rationale, which remains viable today, is a key difference between adult and juvenile offenders.

The first juvenile court was legally created in Chicago, Illinois in 1899. Its philosophy was to treat juveniles charged with crimes not as criminals, but as wards of the state, receiving substitute parental care, trust, and discipline that a neglected detained child might receive. Eldefonso 183. Roscoe Pound declared its purpose not to be that of a criminal court, but of a special court of equity with administrative functions incidental to equity jurisdictions. Caldwell 192, n. 10.

In summary, the parens patriae doctrine developed to refer to the state's responsibility with respect to juveniles. This approach included protection of the incompetent, the neglected, and the delinquent. Siegal 304. This philosophy is effectuated through an "individualized justice" approach. The court adapts orders accordingly, with remedial and preventive results, rather than punitive. Eldefonso 186, n. 3.

C. *The Parens Patriae Doctrine as a Philosophical Basis for the American Juvenile Court System Has Always Satisfied Fourteenth Amendment Due Process Standards.*

The Constitution has never guaranteed an absolute right to be released from detention. The Fourth Amendment permits

arrest on probable cause but says nothing as to how long the arrestee may be held. The Fifth Amendment, although denying detention for a capital crime unless there is a Grand Jury indictment, fails to specify how long an arrestee can be held without indictment. After indictment, the Constitution guarantees a "speedy" trial, but leaves interpretation of the term "speedy" to legislatures and courts. Therefore, courts interpreting the Constitution have generally deferred to legislatures to determine in which cases release may be denied. Meyer, Constitutionality of Pretrial Detention, 60 Geo. L. J. 1382, 1459 (1972) [hereinafter cited as Meyer].

Many states have expressly denied juveniles a right to release on bail (including New York and Texas). S. Davis, Rights of Juveniles—The Juvenile Justice System 3-40.2 (2d ed. 1981) [hereinafter cited as Davis II]. This denial is based on the protective function of juvenile law. In its legislative guide for drafting Family Juvenile Court Acts, the U. S. Department of Health, Education, and Welfare Children's Bureau has stated: "When children are placed in detention or shelter care, there is always a motive to protect the child as well as to protect society. Therefore, as a general rule, bail should not be permitted." M. Midonick, Criminal Law & Practice Handbook Series Number 2—Children, Parents, and the Courts: Juvenile Delinquency, Ungovernability and Neglect 78 n. 2 (1972).

Most statutes do not distinguish between neglect and delinquency in detention procedures. At least thirty-seven states allow preventive detention for community protection, and several states specifically do so only if there is a serious risk that the juvenile is likely to commit a crime if released (New York and Texas included). Shamburek, supra, 522-523 nn. 32-33.

Informalities and discretionary powers in the juvenile system with respect to detention are necessary and desirable. There must be such discretion if the system is to achieve its goals. J. Sprowls, Discretion and Lawlessness: Compliance in the Juvenile Court 13 (1980). Also, a child may be in need of immediate care, and release may be improper without inquiry into the conditions of his environment, which may well be the source of his

difficulty. Paulson, Fairness to Juvenile Offender, 41 Minn. L. Rev. 547, 552 (1957). It would make little sense, for example, to release a juvenile who has committed a senselessly violent murder or robbery to the care of his parents if his parents are inadequate to the task or if the juvenile has not been in their custody—particularly if there is "serious risk" of repetition.

The Uniform Juvenile Court Act (1968) is drafted, according to its statement of purpose, to meet the due process requirements of In Re Gault, 387 U. S. 1 (1967). The Act allows preventive detention to protect the child or other persons or property. Uniform Juvenile Court Act Section 14 (1968).[5]

An absolute or general right to immediate release would be inconsistent with the basic philosophy of the juvenile court—the protection, care, and guidance of the child. Hill, The Constitutional Controversy of a Juvenile's Right to Bail in Juvenile Pre-adjudication Proceeding, 1 Hastings Const. L. Q. 215, 227 (1974).[6] A serious risk that the juvenile will commit a crime if released (N. Y. Fam. Ct. Act section 739 (a) (ii)) involves such a consideration for the welfare of the juvenile as well as the state. In juvenile proceedings, In Re Gault requires only that procedures be measured according to essentials of fairness and due process under the Fourteenth Amendment. Davis II 3-43. The traditional protective benefits of juvenile court proceedings, which require special responsibilities that are not necessarily appropriate for adults, will satisfy fundamental fairness criteria if the provision is properly drafted and properly administered. The New York detention statute is such a provision and should be preserved as well as differently drafted statutes, such as that of Texas.

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5 See also, Standard Juvenile Court Act Section 17; Kalnins, Right to Bail for Juveniles, 48 Chi-Kent L. Rev. 99 n. 50 (1971) (President's Commission on Crime).

6 Accord, Note, 18 Vand. L. Rev. 2096, 2100-2101 (1965).

II. EVEN IF ADULT BAIL STANDARDS ARE APPLICABLE TO JUVENILES, THE HISTORY OF THE EXCESSIVE BAIL AND DUE PROCESS CLAUSES SUPPORTS ENACTMENTS OF THIS NATURE.

"[A] study of the constitutional and statutory provisions which regulate the system of bail in the United States, while revealing an increased regard for the rights of the individual, will nevertheless indicate that *there is no constitutional right to bail.*" Duker, The Right to Bail: A Historical Inquiry, 42 ALBANY L. REV. 33, 34 (1977) [hereinafter cited as Duker] (emphasis added). Duker's is the most thorough recent work on the subject. The evidence marshalled by Duker is overwhelming.[7]

A. English Antecedents of the Excessive Bail Clause Acknowledged the Existence of Legislatively Created Nonbailable Offenses and Were Concerned with Arbitrary Administration of Bail.

The first systematic treatment of bail in England was brought about by the Assize of Claredon in 1166. Prior to that time, all offenses were bailable. The Assize asserted a new interest of the King in law enforcement. It resulted in a list of nonbailable offenses, including "those arrested by our special command, or that of our chief justice, or for an offense in our forest, or for any other [wrong] for which, according to English custom, he is not replevisable." Duker 44-45. Thus began the tradition of non-bailable offenses, which has continued to the present.

The Statute of Westminister I, which was an early bail reform, contained an explicit list of bailable and nonbailable offenses. Duker 45-47. In addition to the nonbailable offenses created by Westminister I, Parliament created others, including certain "vagabonds." Duker 56-58.

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7 Accord, Meyer, 1145-1164.

By the Petition of Rights, in 1628, Parliament caused the King to accept the "law of the land" (i.e., the list of nonbailable offenses of Westminister I) as the authority for denial of bail. He frustrated this law by delays in habeas corpus, prompting the Habeas Corpus Act of 1677. It provided for bail to be set within 3 days "in any sum, according to [the judge's] discretion, . . . *unless . . . by law the prisoner is not bailable.*" Duker 58-66.

This law enforced Westminister I, but the King's justices frustrated it, too, by requiring bail in excessive amounts for bailable offenses as a means of denying bail. Thus ten years after the Habeas Corpus Act, Parliament passed, and the King accepted, the English Bill of Rights. It closed the loophole by declaring that "excessive bail ought not to be required." This Act did not affect nonbailable offenses, which continued to exist. Duker 66.

Since the American Constitution's excessive bail clause was derived from the English Bill of Rights, this history should be illuminative of its meaning. The English Bill did not change the long history of bail denial by statutory enactment. The same concern was expressed in every reform measure following Westminister I, and no reform measure amounted to an effort at wholesale bail guarantees.

Similarly, the due process clause (which has a less specific relationship to bail or to detention) traces to antecedents that coexisted with pretrial detention. Its history includes the imposition of the "law of the land" upon the king in Magna Charta, as well as the Petition of Rights of 1628 and the English Bill of Rights. All of these charters were construed to allow detention pursuant to legislative enactment. See generally Duker, supra; Meyer, supra.

B. The Pre-Constitutional American States Recognized Legislative Creation of Circumstances for Detention.

Pre-constitutional States recognized the non-existence of a general right to bail. Six of the colonies—Connecticut, Delaware, Georgia, Maryland and Rhode Island—simply adopted the rights

guaranteed in England. Duker 80-81. "However, Englishmen in the homeland possessed no right to bail beyond that allowed by the legislature." Id. In Virginia, the Statute of Westminister I was the "core of the law defining which offenses were bailable." Id. at 78. The colonial Virginia legislature enacted protections for persons obtaining bail, "in such case as by law he or she may be bailable." 3 Va. Stat. 391 (Hening ed. 1923). In Massachusetts, bail guaranties did not extend to capital cases, contempt of court, or offenses excluded by express act of the legislature. New York and Pennsylvania adopted colony charters limiting denial of bail to capital offenses, but at certain times they had charters allowing broader bail denial.

After 1776, under the Articles of Confederation, the States made even more clear the legislative power to deny bail. In three states, excessive bail was prohibited to be required "*by courts*," leaving the legislature free to enact denials of bail. In two others, excessive bail was prohibited "for *bailable* offenses." Three merely enacted denials of excessive bail, and the legislatures freely continued to deny bail. The remainder adopted English law, which allowed legislative bail denial. Duker 81-82.[8]

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8 There are other authors who have concluded that the excessive bail clause creates "an absolute right to bail." E.g., Foote, The Coming Constitutional Crisis in Bail (Pt. I.), 113 U. PA. L. REV. 959 (1965). Foote asserts that Mason, as draftsman, lifted the clause from the English Bill of Rights, and that "critical language which is in the preamble of the English Bill of Rights . . . clearly spells out the basic right to bail . . . drawn together from enactments which in England went back to 1215." In the first place, the English Bill of Rights contains no such universal right of bail. In the second place, the English history before and after the English Bill of Rights included legislative denial of bail. In the third place, the more immediate antecedent to the language chosen by Mason was the charters of the colonies, which allowed legislative bail denial. In the fourth place, the English Bill of Rights was preceded only 10 years earlier by the Habeas Corpus Act, which denied bail for "Offenses for which by Law the Prisoner is not bailable," and the English Bill of Rights did not in any wise contravene this express language. See generally Duker, supra, at 84 n. 303; accord, Meyer, supra, 60 GEO. L. J. at 1180-90.

In summary, it is inconceivable that the drafters of the original due process clause of the fifth amendment conceived of it as extending a general right to bail in cases of "serious risk;" and since the due process clause of the fourteenth amendment contains identical wording and was preceded by a similar history, it is equally unlikely that its drafters so conceived it.

III. THIS COURT SHOULD NOT REQUIRE THE SEVERAL STATES TO ADOPT A UNIFORM MODEL OF PRETRIAL DETENTION.

The Court of Appeals concluded that pretrial detention on the basis of predetermined "serious risk" to the community is improper, as it results in punishment before adjudication, denies a juvenile due process rights, and fails to put emphasis on his best interests. This reasoning should be rejected.

A. *An individualized determination for detention of a few days, based on a legislative standard such as "serious risk," does not introduce "uncontrolled" discretion into the process. Such an approach is well within the parameters set by this Court's decisions for even more serious determinations.*

The Court of Appeal's approach holds the statute unconstitutional because it requires an individualized finding of "serious risk" and thereby, according to the Court of Appeals, introduces uncontrolled judicial discretion into the process. But the New York approach—that if bail is to be denied, it is to be denied on the basis of individual factors—treats each individual in accordance with his individual characteristics, and yet provides a legislative standard—that of "serious risk" of further offenses—that places limits upon judicial discretion. [9]

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9 For an excellent defense of the view that judicial prediction of dangerousness can, indeed, be done, see, e.g., Meyer, supra, at 1146-49.

The Court of Appeals' opinion in this regard is untenable when it is compared to this honorable Supreme Court's holding in Jurek v. Texas, 96 S. Ct. 2950 (1976). There, the Court upheld death penalty sentencing based on a finding of "probability" that the defendant would "commit future crimes of violence" so as to be a "continuing threat to society." See also Barefoot v. Texas, ____ U. S. L. W. ____ (U. S. S. Ct. July 6, 1983) (upholding allegedly "speculative" psychiatric testimony related to "probability of future dangerousness" issue). The "serious risk" standard of New York, which supports very brief detention, is arguably more specific than the "probability" and "continuing threat" standard for death sentencing approved in Jurek and Barefoot. Nor does the evaluation of risks of future occurrences inject "uncontrollable" discretion. As the Court indicated in Jurek, such determinations are common in various stages of the criminal justice system, including (as the Court expressly pointed out) the decision to detain an accused or admit him to bail.

B. The Courts below erred in using testimony based upon social statistics to determine constitutional law.

The courts below were evidently affected by the testimony of sociologist Leslie T. Wilkins.[10] Wilkins' view is that detention should be done, if at all, on a statistical or "actuarial" basis.[11] This approach would consist of determining the "best" predictors by a mathematical model. According to Wilkins, the determinants should be statistically derived (by what he calls "sophisticated" techinques, such as multiple regression analy-

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10 Joint Appendix 184-226.

11 Id. 189-91. A less precise approach, according to Wilkins, is the "clinical" approach, which means "a somewhat systematic and ordered subjective assessment of data." An "actuarial" approach means that "the data are standardized, weighted and subject to the rigors of contemporary decision theory and statistical analysis," according to Wilkins. Id. 189.

sis.[12] Detention should then be controlled by these statistically derived factors (and deviations should be controlled by procedural constraints).

This analysis is inappropriate as a means of determining constitutional law. "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics." Lochner v. New York, 198 U. S. 45 (1905) (Holmes, J., dissenting).[13]

If Wilkins' statistical approach were constitutionally required, there would be no reason to distinguish other kinds of fact decisions. Current sentencing ranges under the laws of the United States would be unconstitutional. Sentencing should instead be done by determinate factors, statistically derived from multiple regression analysis. (In fact, Leslie Wilkins has specifically so argued).[14] And in a murder case, the categories of evidence that the jury could consider in determining liability would be fixed in advance, by legislation derived from statistical studies. Multiple regression analysis would also fix the evidentiary factors by which jurors would decide which of two colliding vehicles entered the intersection against a red light. Such is the result respondents are, in fact, advocating in this case for the fact determination on which detention is based.

The Constitution requires sufficiently definite ultimate standards, within the limitations of language precision. A standard may be as general as "reasonableness," "criminal negligence," or "recklessness" (which are all terms used to define offenses in the

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12 Although Wilkins did not use the words "multiple regression analysis," an examination of his testimony and his prior work make the reference clear. Id. 189-91, 195-200, 212; cf. authority cited note 14 infra.

13 Mr. Justice Holmes' view later became law in Nebbia v. New York, 291 U. S. 502 (1934).

14 L. Wilkins, J. Kress, D. Gottfredson, J. Kaplin & A. Gelman, Sentencing Guidelines: Structuring Judicial Discretion (1976).

Model Penal Code, for example) and still be constitutional.[15] The standard of "serious risk" of future crimes as a guide for short detention is clearly within the limits of due process exemplified by these standards.

Actually, insistence upon an unattainable degree of precision is harmful. For example, pretrial release workers who interviewed David Berkowitz, a multiple murderer who adopted the name "Son of Sam," accurately reported that he met statistically derived criteria for release on his own recognizance.[16] A judge applying the sort of criteria that Wilkins criticizes as "subjective" sensibly declined to order Berkowitz's release.

Wilkins' views regarding prediction are not universally held. In sociology textbooks, they are often juxtaposed with sharply differing views.[17] While his arguments are interesting, Wilkins' opinions should not be enacted into positive constitutional law.

C. *The statute here in question is at least as consistent with the purposes of the due process and excessive bail clauses as a categorical definition of nonbailable offenses.*

At the time of adoption of the excessive bail clause and fifth amendment due process clause, pretrial detention was done on the basis of offense categories, without consideration of individualized factors at all. See Pt. II of this Brief, supra. In Murphy v. Hunt, supra, the last case brought before this Court

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15 See, e.g., Nash v. United States, 229 U. S. 373, 374 (1913) (concluding that standards such as criminal negligence are constitutional) (Holmes, J.).

16 This finding was objectively "correct;" it was based on such factors as the defendant's employment, local residence, and lack of prior criminal record.

17 E.g., N. Johnston, L. Savitz & M. Wolfgang, The Sociology of Punishment and Correction sec. IV (1962).

vidualized factors at all. See Pt. II of this Brief, supra. In Murphy v. Hunt, supra, the last case brought before this Court involving pretrial detention, the Nebraska provision at issue allowed bail denial in rape cases, upon "proof evident." The provision was there attacked as failing to require consideration of individual offender characteristics. The lower court had held it unconstitutional, in fact, because it was categorical rather than individualized. It would be ironic if the New York statute here in question were considered unconstitutional because it required an individualized determination, combined with a legislative standard of serious risk.

In truth, there are advantages to both the "categorical" model and the "individualized" model. In a federal system, states should be free to choose between competing approaches with different benefits, and neither should be given exclusive approval here.

CONCLUSION

This honorable Supreme Court should not disallow brief detentions of juveniles pursuant to valid legislative enactments. It should recognize that such detention has historically been considered to comply with due process because of the parens patriae doctrine and because of the philosophical basis of the juvenile justice system, for reasons that remain valid. Even if adult standards are applicable, enactments of this nature should not be invalidated. Finally, the Court should not require that the several States limit themselves to a single form of statute. In particular, an individualized model, as New York's, is at least as consistent with the purposes of the due process clause and with minimal standards of fundamental fairness as a categorical approach. The standard of serious risk does not introduce "uncontrolled" discretion into the process, nor is it unconstitutional merely because it uses existing evidence to evaluate future risks; the decisions of this Court indicate that such a standard is proper.

Respectfully submitted,

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IN THE SUPREME COURT
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ELLEN SCHALL, As Commissioner of the New York City Department of Juvenile Justice,

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Intervenor-Appellant

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees

On Appeal From the United States Court of Appeals for the Second Circuit

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AMICI CURIAE BRIEF IN SUPPORT OF APPELLEES ON BEHALF OF THE YOUTH LAW CENTER AND THE JUVENILE LAW CENTER OF PHILADELPHIA

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Nos. 82-1248, 82-1278

IN THE SUPREME COURT
OF THE
UNITED STATES
October Term, 1983

ELLEN SCHALL, As Commissioner of the New York City Department of Juvenile Justice,
Appellant

and

ROBERT ABRAMS, as Attorney General of the State of New York,
Intervenor-Appellant

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,
Appellees

On Appeal From the United States Court of Appeals for the Second Circuit

AMICI CURIAE BRIEF IN SUPPORT OF APPELLEES ON BEHALF OF THE YOUTH LAW CENTER AND THE JUVENILE LAW CENTER OF PHILADELPHIA

INTEREST OF AMICI CURIAE

The Youth Law Center is a public interest law firm, located in San Francisco, which was formed as a nonprofit corporation "to provide legal education, advice, counsel, representation, and general assistance in reform of the law regarding the rights of minors." During the past five years, Youth Law Center attorneys

have provided research, training and technical assistance to public officials, parents, and children's advocates in more than thirty states throughout the country, on issues such as conditions of juvenile confinement, incarceration of children in adult jails, inadequacies of mental health care, and rights of children and parents in foster care system. Youth Law Center attorneys have also represented abused and mistreated children in civil rights litigation in fourteen states.

The Juvenile Law Center of Philadelphia is a nonprofit law office committed to assisting children and youth through a program of legal representation and community education. This representation and education involves Juvenile Law Center attorneys in issues of delinquency, adoption assistance, mental health treatment, and foster care.

Attorneys at the Youth Law Center and the Juvenile Law Center in Philadelphia have investigated excessive detention practices in jurisdictions across the country and throughout the state of Pennsylvania. Both Centers currently represent children who are challenging punitive detention practices similar to those of the Appellants in this case.

This brief is being filed with the consent of all parties. Copies of the consent letters are on file with the Clerk of the U.S. Supreme Court.

SUMMARY OF ARGUMENT

I. Due process challenges to juvenile court practices or procedures are evaluated by the standard of "fundamental fairness." In applying this standard, this Court considers the research, findings, and opinions of juvenile justice experts, particularly with respect to (1) the seriousness of the due process deprivation to the juveniles affected, and (2) the importance of the practice to the operation of the juvenile justice system.

II. Expert studies and reports demonstrate that, nationally, juvenile detention is excessive and inappropriate. Each year, large numbers of juveniles are detained in secure facilities. Juveniles are frequently detained for lengthy periods of time, though they are often charged with minor offenses. Detention of juveniles

is *not* related to any legitimate purpose of detention. Accordingly, practices such as those of Appellants, which result in excessive and unnecessary detention, have been criticized by drafters of model juvenile standards and other juvenile justice experts.

III. In addition to the general misuse of detention, juveniles are frequently detained in adult jails, under conditions which are abusive, dangerous and even life-threatening.

IV. Excessive secure detention is not necessary to the operation of the juvenile justice system, and an affirmance in this case does not mean that juveniles must be granted a right to bail. There are many alternatives to secure detention besides bail, including numerous types of community-based placements.

ARGUMENT

I. INTRODUCTION

"Fundamental fairness" is the standard this Court has used in each of its prior decisions involving due process challenges to juvenile court practices or procedures. *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *Breed v. Jones*, 421 U.S. 519 (1975). In determining whether an accused juvenile is entitled to a particular due process protection, this Court has regularly considered the seriousness of the due process deprivation to the juvenile, and the importance of the practice to the operation of a distinctive and beneficial justice system for juveniles.

However, in applying this standard, this Court has never allowed the professed goals of the founders and supporters of the juvenile justice system blind it to the fact "that there is a gap between the originally benign conception of the system and its realities," *Breed v. Jones, supra*, 421 U.S. at 528. As this Court has noted, "There is evidence... that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *In re Gault, supra*, 387 U.S. at 18 n.23, *quoting Kent v. United States*, 383 U.S. 541, 556 (1966).

As this Court has recognized, the label of juvenile delinquency is stigmatizing, *In re Gault, supra*, 387 U.S. at 24, *In re Winship, supra*, 397 U.S. at 367, and "[r]egardless of the purposes for which incarceration is imposed, the fact remains that it is incarceration." *Breed v. Jones, supra*, 421 U.S. at 530 n.12. Therefore, this Court has been extremely reluctant to find that a juvenile was not entitled to full due process protections. Only where it was found that a due process right "might well destroy the traditional character of juvenile proceedings," and that "other procedural rights... will give the juveniles sufficient protection," has this Court refused to extend adult due process protections to the juvenile justice system. *McKeiver v. Pennsylvania, supra*, 403 U.S. at 540.

The fact that any imposition of due process standards inherently reduces flexibility and discretion has never been ground for denial of such rights. To the contrary, "juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault, supra*, 387 U.S. at 18. Nothing more clearly demonstrates this point than the detention practices at issue in this case, which are typical of juvenile detention throughout the nation.

This brief discusses the numerous studies, reports and other research regarding juvenile detention practices developed by juvenile justice experts over the last 25 years. This Court has regularly relied on such information in its past cases to help assess the fundamental fairness of a juvenile court practice or procedure. *See, e.g., In re Gault, supra*, 387 U.S. at 12-30; *McKeiver v. Pennsylvania, supra*, 403 U.S. at 543-47; *Breed v. Jones, supra*, 421 U.S. at 530-31. These reports are important in evaluating both the impact of current practices on the juveniles detained, and the relative necessity of the practices to the operation of the juvenile courts. As this brief will demonstrate, the studies, reports and model standards prepared by juvenile justice experts overwhelmingly condemn the type of detention practices followed by Appellants in this case.

From these reports, several facts clearly emerge: (1) every year large numbers of juveniles are detained prior to adjudication in secure facilities; (2) most of those juveniles are charged with minor offenses or status offenses, and most are

released, like the petitioners in this case, at or before their adjudication hearings; (3) current juvenile detention practices are *not* related to any legitimate purpose of detention; (4) many juveniles are detained in adult jails under abominable conditions; and (5) the great majority of detained juveniles could be safely released to their families or to community-based programs, with no concomitant danger to the juveniles or to the public.

The studies and reports make it clear that, far from being an integral part of the juvenile justice system, current detention practices are arbitrary and seriously harmful to accused juveniles.

II. PUNITIVE AND UNNECESSARY DETENTION OF JUVENILES OCCURS THROUGHOUT THE UNITED STATES

A. *Large Numbers of Juveniles Are Detained Annually in Secure Facilities*

The United States Department of Justice, *Sourcebook of Criminal Justice Statistics — 1981* 457 (1981), reported that 11,508 juveniles were detained on the single survey day in 1979. In 1978, 392,000 juveniles were confined in secure juvenile detention centers and 480,000 juveniles were held in adult jails and lockups. Community Research Forum, University of Illinois, *An Assessment of the National Incidence of Juvenile Suicide in Adult Jails, Lockups, and Juvenile Detention Centers* 9 (U.S. Government Printing Office 1980). Others have estimated that as many as 1,000,000 juveniles are placed in secure confinement annually, and up to 15,000 are detained on any one day.[1/] As one commentator has observed, "[o]ver the years we have failed to notice, much less explain, the striking fact that short term detention/jailing has become America's primary 'correctional response' to arrested juveniles...." Lerman, "Discussion of 'Differential Selection of Juveniles for Detention' " 14 *J. Research in Crime and Delinquency* 166, 170 (July, 1977).

[1/] *See, e.g.*, R. Sarri, *Under Lock and Key: Juveniles in Jails and Detention* (University of Michigan 1974); National Council on Crime and Delinquency, "Corrections in the United States," 13 *Crime and Delinquency* 1, 15 (1967).

B. *Juvenile Detention Is Often Inappropriate and Unnecessary*

There is widespread agreement that too many juveniles are unnecessarily and inappropriately detained in secure facilities. In 1968, the President's Commission on Law Enforcement and Administration of Justice stated that "[d]etention appears to be far too routinely and frequently used for juveniles...." President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 233-34 (1968). Unfortunately, this remains equally true today.

The U.S. General Accounting Office, in "Report to the Attorney General and the Secretary of Interior: Improved Federal Efforts Needed to Change Juvenile Detention Practices" (GAO/GGD 83-23, Mar. 22, 1983) [hereinafter GAO Report], recently concluded that questionable uses of secure detention remain common in the United States. The study used the FBI uniform crime reporting classification for serious and nonserious offenses and sampled detention practices in five states. The GAO Report found:

> In the five States we visited, ... between 22 and 51 percent of the detained juveniles in our sample were charged with non-serious offenses, status offenses, or no offense at all. Also, juveniles were held in secure detention for long periods of time.

Id. at 6. In one state "over 36 percent of the sampled juveniles ... were accused of status offenses or were not accused of any offense at all." *Id.* at 10. Further, "statistics supplied by one State showed that about 80 percent of the juveniles in detention centers in fiscal year 1980 had not been charged with a serious offense." *Id.* The report further found that "[f]emale juveniles in our sample were detained for reasons other than serious crimes in much higher proportion than male juveniles." [2/]

2/ "State records also showed that females were detained for less serious reasons. For example, one State's statistics showed that about 91 percent of the detained females were charged with offenses other than serious crimes. One of

These findings are fully consistent with earlier reports and studies. For example, an article reviewing juvenile studies conducted during the 1960's concluded that: "... under any reasonable definition of 'dangerousness,' danger to the community is not the reason for holding the majority of the detained children...." Ferster, Snethen and Courtless, "Juvenile Detention: Protection, Prevention or Punishment," 38 *Fordham L. Rev.* 161, 168 (1969). The National Council on Crime and Delinquency, in "Corrections in the United States," 13 *Crime and Delinquency* 1 (1967), reported that in 1965, 409,218 juveniles were detained, but only 242,275 were committed or placed on probation following disposition.
Another study reported:

> When similar offenders are compared (same race, sex and number of prior referrals), juveniles who have been referred to court for juvenile offenses such as runaways and incorrigibility are *more* likely to be detained than are those accused of more serious violations.

Kramer and Steffensmeier, "The Differential Detention/Jailing of Juveniles: A Comparison of Detention and Non-Detention Courts," 5 *Pepperdine L. Rev.* 795, 799 (1978) (emphasis added).

C. *Juveniles Are Detained for Lengthy Periods of Times*

The problem is exacerbated by the fact that these detentions are often for long periods of time. In 1973, the U.S. Senate Subcommittee to Investigate Juvenile Delinquency determined that juveniles were detained an average of two weeks, and some were detained for months. *The Detention and Jailing of Juveniles: Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, 93d Cong., 1st Sess. 299 (1973). The GAO found that, "The 876 juveniles in

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the largest counties in another State predicted, on the basis of past practices, that 80 percent of its detained status offenders would be females." GAO Report at 10-11. The tendency of juvenile courts to detain disproportionate numbers of female teenagers for minor or nonoffenses has been frequently noted. *See, e.g.*, Pawlak, "Differential Selection of Juveniles for Detention," 14 *J. Research in Crime and Delinquency* 152, 162-63 (1977).

our sample were held in secure detention for periods ranging from a few hours to 612 days with 181 stays lasting over 30 days." GAO Report at 11. Another recent report, based upon data collected by the U.S. Census Bureau, found that in 1979, "the average length of detention stay ranged from 3 days in Arkansas to 33 days in South Carolina."[3/]

D. *Detention Practices Vary Greatly from State to State*

Further studies have found a remarkable disparity in the rates of detention from county to county and state to state. The National Council on Crime and Delinquency's survey of juvenile detention practices, prepared for the President's Commission on Law Enforcement and the Administration of Justice in 1966, concluded, "The use of detention differs so widely from county to county and state to state that whether a youngster will be detained is a matter of geographic accident." National Council on Crime and Delinquency, "Corrections in the United States," *supra*, at 27. Several research studies in the 1970's confirmed the substantial variations in juvenile detention.[4/] The most recent report demonstrates that substantial variations in detention continue unabated.[5/]

E. *Current Juvenile Detention Practices Are Not Related to Any Legitimate Purpose of Detention*

Many of these studies have attempted to correlate the variations

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3/ Krisberg, Litsky and Schwartz, *Youth in Confinement: Justice by Geography* 18 (Hubert H. Humphrey Institute of Public Affairs, University of Minnesota, 1982).

4/ Pappenfort, Kilpatrick, Morgan and Kirby, *A Census of Children's Residential Institutions in the United States, Puerto Rico and the Virgin Islands*, 7 vols. (School of Services Administration, University of Chicago, 1970); Poulin, Levitt, Young, Pappenfort, *Juveniles in Detention Centers and Jails: An Analysis of State Variations During the Mid-1970's* (1980); Kihm, "Prohibiting Secure Juvenile Detention: Assessing the Effectiveness of National Standards Detention Criteria," 31 *Juv. and Fam. Court J.* 3 (August, 1980).

5/ Krisberg, Litsky and Schwartz, *supra* note 3.

in secure detention with: (1) purported justifications for its use (*i.e.*, prevention of additional crimes or assuring attendance at court proceedings), or (2) legitimate jurisdictional differences (*e.g.*, more serious crime, higher arrest rates, urban/rural environment). After making these correlations, there is one thing upon which all of the independent research agrees, "in no case were these interjurisdictional differences explained away by differential rates of serious and violent youth crime."[6/]

One study compared urban and rural jurisdictions which used strict detention criteria and those which did not:

> Both the urban and rural jurisdictions [using] the criteria detained significantly fewer children than the comparison counties, even though the court referral populations were similar or even more serious in the counties [using] the criteria. There was *no significant difference* in the failure to appear rates for either the rural or urban jurisdictions. Total rearrest rates and felony rearrest rates were *similar or even lower* in both the rural and urban jurisdictions [using] the criteria.

Kihm, "Prohibiting Secure Juvenile Detention: Assessing the Effectiveness of National Standards Detention Criteria," 31 *Juv. and Fam. Court J.* 3, 12-13 (August, 1980) (emphasis added).

Many other factors were apparently much more significant in the decision to use secure detention, including the "get-tough" attitude of the judge,[7/] the number of secure detention beds

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6/ Pawlak, "Differential Selection of Juveniles for Detention," *supra* note 2; Law Enforcement Assistance Administration, *Pre-Adjudicatory Detention in Three Juvenile Courts: An Empirical Analysis of the Factors Related to Detention Decision Outcomes* (U.S. Gov't Printing Office 1975).

7/ In a survey of juvenile court judges conducted by the National Assessment of Juvenile Corrections, 49% of the judges responded that "placing a youth in detention is a good way to show him that the court means business." Sosin and Sarri, "Due Process — Reality or Myth," in *Brought to Justice? Juveniles, the Courts and the Law* 176-89 (R. Sarri and Y. Hassenfeld eds. 1976). *See also* Ferster, Snethen and Courtless, "Juvenile Detention: Protection, Prevention or Punishment?" 38 *Fordham L. Rev.* 161, 170-71 (1969); Mahan, "Ohio's Dictator Judge," *Columbus Monthly* (September, 1982).

available,[8] the availability of alternative placements,[9] the acceptability or availability of the parents as perceived by juvenile court personnel,[10] and the absence of 24-hour and weekend intake services.[11]

F. *Studies, Reports, and Expert Commentaries Reject the Type of Punitive Detention Practices at Issue in This Case*

One of the factors this Court regularly considers in assessing the fundamental fairness of juvenile court practices or procedures is current thinking among juvenile justice experts as reflected in studies, model standards, and other reports.[12]

8/ "When the data are separated into jurisdictions with a detention home and those without detention facilities, it is found that counties with a detention home detain juveniles with greater frequency than courts without a detention home .... Moreover, the frequency of detention is unrelated to the characteristics of the juvenile offender. For example, the data indicate that juveniles with similar characteristics have a higher probability of detention in courts with a detention home than in courts without a detention home. Kramer and Steffensmeier, "The Differential Detention/Jailing of Juveniles: A Comparison of Detention and Non-Detention Courts," 5 *Pepperdine L. Rev.* 795, 798-99 (1978). *See also* Pawlak, "Differential Selection of Juveniles," *supra* note 2, at 154-57.

9/ Rosenheim, "Detention Facilities and Temporary Shelters," in *Child Caring: Social Policy and the Institution* 253, 266-69 (Pappenfort, et al., eds. 1973); Sarri, *Under Lock and Key: Juveniles in Jails and Detention*, *supra* note 1.

10/ Law Enforcement Assistance Administration, *Pre-Adjudicatory Detention in Three Juvenile Courts: An Empirical Analysis of the Factors Related to Detention Decision Outcomes*, *supra*. "Obviously, youth who have no home or whose parents refuse to accept them run the highest risk of detention regardless of what they have or have not done." Sarri, "Service Technologies: Diversion, Probation and Detention," in *Brought to Justice? Juveniles, the Courts and the Law* 151, 167 (R. Sarri and Y. Hassenfeld eds. 1976).

11/ Wald, "Pretrial Detention of Juveniles," in *Pursuing Justice for the Child* 119, 121, 127 (1976); R. Sarri, *Under Lock and Key: Juveniles in Jails and Detention*, *supra*, at 71; Ferster and Courtless, "Juvenile Detention in a Affluent County," 6 *Fam. L. Q.* 3, 29 (1972).

12/ *E.g.*, *In re Gault*, *supra*, 387 U.S. at 12-30; *McKeiver v. Pennsylvania*, *supra*, 403 U.S. at 543-47.

As a result of these studies and findings, juvenile justice experts and drafters of model standards have sharply criticized the vagueness which characterizes juvenile detention statutes such as New York's.[13/] The specifics of the model juvenile justice standards will be discussed more fully by other *amicus*,[14/] but it is important to recognize that virtually all of the juvenile studies and standards cited in this brief recommend carefully tailored restrictions on the currently unbridled discretion of juvenile court judges to order secure detention.

Requiring states such as New York to revise their juvenile detention statutes to avoid the arbitrariness which currently plagues the system would in no way "compel states to abandon or displace any of the substantive benefits of the juvenile process," *In re Gault*, *supra*, 387 U.S. at 21, as suggested by Amici Attorneys General.[15/] To the contrary, current detention practices have done much to undermine the credibility of the juvenile courts and divert needed resources from the primary task of rehabilitating serious juvenile offenders.

As stated in the introduction to Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition* 1-3 (1980) (footnotes omitted):

> The detention of juveniles prior to adjudication or disposition of their cases represents one of the most serious problems in the administration of juvenile justice. The problem is characterized by the very large number of juveniles incarcerated during this stage annually, the harsh conditions under which they are held, the high costs of such detention,

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13/ Amici Attorneys General argue that many model statutes, standards or general commentaries support some form of preventive detention for juveniles. However, Amici Attorneys General never even attempt to connect this general proposition with the specific questions presented by this case. In fact, most model standards emphatically reject vague, discretionary detention statutes such as New York's.

14/ *See* Amicus Curiae brief of the American Bar Association.

15/ Brief of Amici Attorneys General, p. 20.

and the harmful after-effects detention produces.

> In contrast to the pretrial stage, much greater care and sensitivity is usually devoted to the postadjudicative disposition, its facilities and its alternatives to incarceration. The result, paradoxically, is considerably less detention under better conditions once the juvenile justice system ceases to presume that the juvenile is innocent.
>
> This volume proceeds on the premise that the danger of too much detention before trial or disposition currently outweighs the danger — both for juveniles and society — of too much release.

The standards adopted by the Institute of Judicial Administration and the American Bar Association, as well as those proposed by the National Advisory Committee on Criminal Justice, *see* National Advisory Committee on Criminal Justice Standards and Goals, *Report of the Task Force on Juvenile Justice and Delinquency Prevention* (1976), severely curtail the broad discretion to detain which has led to so many abuses over so many years. Research has revealed that if the standards are implemented, "... potentially more than half of the estimated one million children annually detained could be safely released to supervised non-secure settings." Kihm, "Prohibiting Secure Juvenile Detention: Assessing the Effectiveness of National Standards Detention Criteria," *supra*, at 16.

G. *Detention in Other States Is Similar to That in New York*

In the wake of the lower court decisions in this matter, children's advocates outside of New York began examining detention practices in other jurisdictions. Amici herein have investigated detention practices in the Second District Juvenile Court in Utah (Salt Lake City) and in the State of Pennsylvania.

1. *Detention in Utah*

In late 1979, the Utah Division of Youth Corrections prepared

a report to a state legislative committee regarding detention of juveniles at the Salt Lake County Detention Facility. Utah Division of Youth Corrections, *Response to Request by Social Services Interim Study Committee For Additional Data Concerning Salt Lake County Detention Utilization* (Dec. 12, 1979). The report indicates that between January and June, 1979, only 4.9% of the juveniles brought before the juvenile court ultimately received a secure commitment, either to the Youth Development Center (state training school), the state hospital, or to detention. *Id.* at 21. Put another way, the report indicates that 95.1% of the juveniles detained at the Salt Lake facility had their charges dismissed or were released to nonsecure placements at or before their dispositional hearings. This is a substantially higher percentage than in the case before this Court, where the Court of Appeals noted that in New York City between 50% and 70% of juveniles detained were released at or before disposition. *Martin v. Strasburg*, 689 F. 2d 365, 369 n.18 (2d Cir. 1982).

A more comprehensive report on detention in Salt Lake County in 1979 was prepared by the National Council on Crime and Delinquency, using data supplied by the Utah Second District Juvenile Court. National Council on Crime and Delinquency Research Center, *Utah Second District Juvenile Court Study, Vol. I: A Process Study of Juvenile Court Intake, Detention, Disposition, and Probation Services* (1979). Two findings of that report are particularly relevant to the instant case. First, the report found that 38.8% of the youth for whom no petition was ever filed were nevertheless held in secure detention. *Id.* at 35. The report states:

> This is an important finding. Admission to detention should be reserved for those cases where there is a high probability of petition filing. A considerable body of opinion suggests that youth should not be admitted to detention unless there is a high probability that the youth may be sent to an institution. This data further underscores the need for more restrictive detention criteria and very careful monitoring of detention center practices to ensure detention is reserved for those youth likely to remain under the court's jurisdiction.

Id. Second, the report indicates that for all of 1979, only 10% of

the juveniles detained were ultimately committed to a secure facility; 90% of the juveniles detained had their charges dismissed or were released to nonsecure placements. *Id.* at 53 (Table 3-7).

The above data indicate that juvenile court detention practices in Salt Lake County are as unnecessary and punitive as those in New York City. Nine out of ten of the juveniles locked up in the Salt Lake County facility are detained "not for preventive purposes, but to impose punishment for unadjudicated criminal acts." *Martin v. Strasburg*, *supra*, 689 F. 2d at 372.

2. *Detention in Pennsylvania*

New York state's statutory scheme authorizing the detention of allegedly delinquent children for crime prevention purposes parallels sections of Pennsylvania's Juvenile Act, 42 Pa. C.S. §§6325, 6331 and 6341, which provide for pretrial detention to "protect the person or the property of others or of the child." While this language differs slightly from New York's preventive detention statute, the intent, purpose and results are identical.

The detention practices in New York state described by the lower courts in this case are duplicated in Pennsylvania. New York's statutory scheme yielded the paradoxical result that "the vast majority of juveniles considered sufficiently dangerous by the Family Court to justify pretrial incarceration ... are in fact released by prosecutors or by the Family Court within days or weeks." *Martin v. Strasburg*, *supra*, 689 F. 2d at 369. In Pennsylvania, the majority of those detained are also released. Moreover, for those juveniles who are placed by the court at the disposition hearing, nearly all are sent to nonsecure facilities: less than 3% of the children charged with offenses in Pennsylvania are sentenced to a secure institution, although over 20% statewide are detained in secure facilities prior to adjudication. Juvenile Court Judge's Commission, *Pennsylvania Juvenile Court Dispositions* Tables B, 13 and 15 (1982). Furthermore, as in New York, the great majority of children who are detained under Pennsylvania's Juvenile Act are not serious or violent offenders.[16/]

16/ Only 17% of those detained in Pennsylvania in 1982 were charged with rape, robbery, arson, or aggravated assault. (Murder is not considered a juvenile offense in Pennsylvania.) *Pennsylvania Juvenile Court Dispositions*, *supra*, Table 14.

III. PUNITIVE AND UNNECESSARY DETENTION OF JUVENILES ALSO OCCURS IN ADULT JAILS THROUGHOUT THE UNITED STATES, UNDER CONDITIONS WHICH ARE ABUSIVE AND LIFE-THREATENING

A. *The Scope of the Problem and the Federal Response*

In her landmark study in 1974, Dr. Rosemary Sarri of the University of Michigan estimated that approximately 500,000 juveniles were detained in adult jails each year. R. Sarri, *Under Lock and Key: Juveniles in Jails and Detention*, *supra* note 1, at 5. A more recent study by the Community Research Forum of the University of Illinois reports that in 1979 an estimated 479,000 children were held in adult jails and lockups. Community Research Forum, *An Assessment of the National Incidence of Juvenile Suicide in Adult Jails, Lockups and Juvenile Detention Centers*, *supra*, at 9. In that year, the California Youth Authority reported that at least 114,166 children were held under the age of 13, and 1,000 were under the age of 9. California Department of the Youth Authority, *Minors Held in California Jails and Lockups During 1979*, at 13, 16 (1981).

During the early 1970's, the problem of children in adult jails attracted the concern of Congress. The Senate Subcommittee to Investigate Juvenile Delinquency held hearings on the problem in 1972 and 1973. Senator Bayh, chairman of the Subcommittee, described the problem:

> The enormity of the problems of juvenile detention is staggering. On any given day, there are close to 8,000 juveniles held in jails in the United States. It is estimated that more than 100,000 youths spend one or more days each year in adult jails or police lock-ups. In addition, the average daily population in juvenile detention facilities is over 12,000, with close to 500,000 held annually in such facilities. We intend to consider in these hearings not only the conditions of such jailing and detention but whether this amount of incarceration is necessary.
>
> Our first two days of hearings will focus on the problems

> presented by juveniles in jails. In many jails, contrary to most recommended standards, and often contrary to state law, juveniles are not separated from adults. Tossed in jails with hardened criminals, a runaway may learn how to steal a car or a truant may be taught how to shut off a burglar alarm. Innocent teenagers emerge from jail street-wise. Even a brief stay in jail, rather than deterring crime, may just make a juvenile more sophisticated and less likely to be caught at his next offense. Whether or not the juvenile learns actual criminal skills, young people may often be held weeks or longer in jails lacking adequate medical services and ill-equipped to provide educational or rehabilitative programs for youth.

The Detention and Jailing of Juveniles: Hearings on S.Res. 56, Section 12 Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, supra.

The Congressional hearings resulted in passage of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§5601 *et seq.*, which provides funds to the states to support juvenile justice system reforms. The heart of the Act is the requirement that in order to receive funding, states must develop plans to insure that (1) status offenders will be removed from secure detention, and (2) juveniles will be removed from adult jails where they may have sight or sound contact with adult inmates. 42 U.S.C. §5633(a)(12), (13), (14). Since 1974, the Office of Juvenile Justice and Delinquency Prevention, which implements the Act, has provided funding to support state efforts, technical assistance, research, and demonstration projects.

The problem of jail incarceration of children, however, has in many ways proven resistant to federal and state reform efforts. Children continue to be jailed for minor offenses, under conditions which are abusive and life-threatening.

B. *Over-Detention of Children in Adult Jails*

In a 1976 study, the Children's Defense Fund reported that only 11.7% of the juveniles held in adult jails were charged with dangerous acts. The rest were charged with property crimes or minor offenses, and of these, 17.9% were in jail for status offenses

and 4.3% were not charged with any offense at all. Children's Defense Fund, *Children in Adult Jails* 3-4, 19-20 (1976). Investigations of individual jails confirm that incarceration of children for minor offenses is common. A 1974 study of Colorado jails reported on detention practices in the Mesa County Jail in Grand Junction:

> During the first six months of 1974, the period on which this report concentrated, 449 juveniles were detained, approximately 38% of whom were held for unexplained "probation violations." Thefts were the next highest category of detainees, 44 juveniles or only about 10% of the total. Because of the increase in alleged "probation violations" during the school year and because of comments received from various youth-serving professionals in the county, it is believed that many of the probation violations resulting in closed detention are for truancy, class disruption, smoking on school grounds, etc. It is impossible to reach any conclusion but that as many as 30% of the detentions are illegal and imposed as a result of a punitive philosophy on the part of probation officers and possibly school personnel .... Indeed, the detention supervisor himself stated that in his opinion, at least 50% of the juveniles need only counseling and/or open placement, including 75% of the girls who are presently placed in closed detention.

Hufnagel, *Statewide Plan for the Provision of Detention, Shelters and Detention Services*, 192-93 (Colorado Division of Youth Services 1974) [hereafter, Hufnagel Report].

A similar situation occurred in Lawrence County, Ohio, where the local juvenile court judge ordered young children held in the county jail for truancy, running away from home, and being unruly. Taylor, "Justice for Children: A Jail Cell?" *Los Angeles Times*, Feb. 21, 1982, at 1. Almost 500 children were held in the jail in a three-year period, including 100 who were 14 years old or *younger* and 100 who had committed only status offenses, acts like truancy which would not be crimes if committed by adults. Maher, "Ohio's Dictator Judge," *Columbus Monthly* (September, 1982). For example, the judge routinely sentenced children to one day in jail for each day of unexcused absence from

school. *Id.*

Punitive detention of children in jails occurs throughout the country. In Boise, Idaho, for example, children have been held in the county jail for possession of tobacco or alcohol, and for failure to pay traffic fines.[17] Schmidt, "When 'Legal Inconsistency' Led to Tragedy," *The New York Times*, Aug. 1, 1982.

C. *The Conditions in Jails Are Abusive and Life-Threatening for Juveniles*

The lower federal courts have recognized the dangers to juveniles from incarceration in adult jails. In *Baker v. Hamilton*, 345 F. Supp. 345 (W.D. Ky. 1972), the court found that confinement of juveniles in the Jefferson County Jail constituted cruel and unusual punishment, in view of the "cramped quarters, poor illumination, bad circulation of air, broken locks, no outdoor exercise or recreation, and no attempt at rehabilitation, in addition to the condition of the 'hole,' which Judge Thompson described as horrible." *Id.* at 353.

In *Swansey v. Elrod*, 386 F. Supp. 1138 (N.D. Ill. 1975), the

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[17] In *Cox v. Turley*, 506 F. 2d 1347 (6th Cir. 1974), the Court of Appeals found that incarceration of the plaintiff for five days in the adult jail in Madison County, Kentucky, violated the child's constitutional rights. The events which led to the incarceration are a graphic example of the arbitrary and punitive nature of jail detention of children:

> Duane Cox, a boy 16 years old, was walking down the street in the town of Richmond in Madison County, Kentucky, on a summer evening, Saturday, August 12, 1972. He was doing nothing to attract attention and apparently, was only visiting the town in the county in which his cousin lived, adjoining the one in which he lived with his parents. A police officer arrested the boy for violation of the curfew law, took him to the Madison County jail and lodged him there on the verbal telephoned orders of defendant, Robert Turley, a non-lawyer judge, in charge of juvenile affairs, as is the established custom of the defendants. When the boy was taken to the jail, he asked for the right to telephone his father, to tell him where he was, and of the need for his help. This request of the boy was abruptly refused. The boy was then lodged with the jailer of the Madison County jail. There was no hearing of any kind before the boy was turned over to the jailer.

Id. at 1349.

court ordered the transfer of the plaintiff juveniles out of the Cook County Jail, where they were subjected to serious overcrowding, close contact with adult inmates, inadequate diet, inadequate educational program, and a total absence of recreation or rehabilitative treatment. *Id.* at 1141. The court relied in part on the testinomy of an expert witness, who stated that incarceration in the jail constituted a " 'devastating, overwhelming, emotional trauma....' " *Id.*

In the most recent decision by a federal court on this issue, *D.B. v. Tewksbury*, 545 F. Supp. 896 (D. Ore. 1982), the court noted both the punitive nature of detention and the abusive conditions of confinement at the Columbia County Correctional Facility (CCCF), an adult jail in St. Helens, Oregon. Of 101 children held at the jail during a nine-month period in 1980, for example, 36 were held on status offense charges. *Id.* at 898. Moreover,

> ... status offenders ordinarily are confined *longer* than those detained for criminal acts. In any event, 70 percent of the children who were confined in CCCF in 1981 were released within 24 hours. Nearly 75 percent of the children held in CCCF are released to their parents. A small number pose an immediate threat to community safety or their own safety or may flee from the court's jurisdiction. In 1980, of 124 children confined in CCCF during a nine-month period, only 25 required secure custody. The others could have been released without posing a serious threat to community safety, personal safety, or court jurisdiction.

Id. (emphasis added)

The court found the conditions of confinement appalling. Children were placed in cells without regard to their ages, levels of maturity, or the reasons for their incarceration. There was no adequate training of corrections staff, nor adequate supervision of the children during their periods of incarceration. There was no programming, no provision for exercise or recreation, no educational program, no provision of medical or psychological services, and no written policies pertaining to the care and treatment of incarcerated juveniles. Female juveniles were required to strike a cell door or to yell for assistance in order to receive sanitary napkins. No children were allowed to have

underwear at any time. *Id.* at 898-902. The court concluded:

> CCCF is designed for the purpose of confinement, without regard for human dignity or need. Nothing over and above the basic minimums necessary for the maintenance of bodily functions is provided to children at CCCF. Nothing at CCCF is responsive to the emotional and physical needs of children in conflict with the law and their families. CCCF is a maximum security lock-up facility.
>
> * * * *
>
> Confinement in CCCF is clearly and fundamentally intended to punish children. Punishment is the treatment of choice of Columbia County's Juvenile Department for its detained children. This "treatment" has little or nothing to do with simple detention, rehabilitation, or even the protection of society.

Id. at 903-04. Accordingly, the court found that incarceration of children in adult jails is fundamentally unfair, and a denial of due process rights under the Fourteenth Amendment. *Id.* at 906-07.[18/]

The abusive conditions in adult jails have led to tragedies for detained children throughout the country. One 16-year-old boy hanged himself in his cell in the jail in Lawrence County, Ohio, after his mother had fruitlessly warned jailers that her son would attempt suicide. Three years later, a 15-year-old girl, incarcerated in the jail after she briefly ran away from home and voluntarily returned, was sexually assaulted by a deputy jailer. *Los Angeles*

18/ The 1974 study of Colorado jails reported the following regarding the jail in Grand Junction:

> The principal researcher made two visits to the "juvenile detention center" as it is euphemistically called. During the first visit, the researcher was appalled by the filth of the facility — walls were covered with graffiti, floors were covered with dust, candy wrappers, etc., and the mattresses on which the children sleep were in a deplorable condition. As of the second visit, the walls had been painted and minimal maintenance had been performed.

Hufnagel Report, at 191.

Times, Feb. 21, 1982, p. 1. In the Boise, Idaho, jail one 17-year-old boy, Christopher Peterman, locked up for neglecting to pay $73 in traffic fines, was tortured by other jail inmates over a 14-hour period and eventually beaten to death. William E. Schmidt, "When 'Legal Inconsistency' Led to Tragedy," *The New York Times*, Aug. 1, 1982. Children in several states, overwhelmed by the isolation and loneliness of detention in an adult jail, have committed suicide. *See, e.g.*, "Family Testifies About Oldham Boy's Suicide," *The Louisville Times*, Feb. 1983, p. A-8.

Indeed, a major study, sponsored by the U.S. Department of Justice, concluded that the suicide rate of juveniles in adult jails is almost eight times larger than that of juveniles in juvenile detention centers. Community Research Forum, University of Illinois, *Assessment of the National Incidence of Juvenile Suicide in Adult Jails, Lockups, and Juvenile Detention Centers*, *supra*, at 10.

D. *Abusive Detention of Children in Adult Jails Continues To Be a Problem*

In its recent report on juvenile detention practices, the Government Accounting Office stated:

> None of the 22 jails we visited provided all the physical conditions and services recommended by national standards for juveniles. Several jailers and sheriffs said they did not want to hold juveniles and were not equipped to do so.

GAO Report, at 16. More specifically, the GAO Report noted that juveniles were regularly subjected to substandard conditions:

> Although the physical conditions and services provided in jails varied by locality, in all jails medical, dental and educational services were non-existent or limited. Most jails did not provide for educational assessments or medical exams but did have agreements with local doctors, dentists and hospitals for emergency care.
>
> None of the jails provided educational programs for juveniles other than voluntary graduate equivalency diploma

> programs. No efforts were made to coordinate with the juveniles' local school systems or evaluate their educational needs. Similarly, none of the jails was equipped to provide adequate recreation for juveniles.
>
> Available information showed that juvenile cells at 12 jails did not include the minimum 60 square feet per juvenile recommended by NAC standards. For example, at one facility the three cells used were each about 60 square feet in size and contained four bunks. Other physical conditions also did not meet the standards. Substandard conditions included dim lighting, lack of ready access to toilet or wash basin, and lack of varied diet.

Id. at 17. Additionally, the GAO Report found sight and sound separation, required by the Juvenile Justice and Delinquency Prevention Act, to be inadequate. *Id.* at 17. The report also documented the isolation practices used in some adult jails to separate children from adults.

> In another state, isolation-type cells were used for juveniles at three of the five jails we visited. Also, these juveniles remained in their cells, which local officials in one jail called "dungeons" and "more severe" than adult cells, 24 hours per day.

Id. at 20.

If this Court legitimizes the kind of unnecessary and primitive detention demonstrated in New York, it will also sanction the continued punitive detention of children in adult jails under abusive and life-threatening conditions. Nothing could more clearly condemn the children of this country to " 'the worst of both worlds.' " *In re Gault, supra*, 387 U.S. at 18 n.23 (1967).

IV. THERE ARE MANY ALTERNATIVES TO SECURE DETENTION OTHER THAN BAIL

Amici Attorneys General and Texas District and County Attorneys assume that bail is the only alternative to the punitive preventive detention to which appellees are subjected. They then

argue from that assumption that imposition of a bail procedure would be inconsistent with the purposes and functions of the juvenile justice system. They conclude that, since the only alternative to punitive detention is inappropriate, the detention practices of appellants must be preserved. [Attorneys General Amici brief, pp. 3, 22-24; Texas brief, pp. 10-13.]

Amici's argument is both erroneous and irrelevant, for two reasons. First, there are many alternatives to secure detention other than bail. Indeed, many of these alternatives are already in use in amici's own states. Second, these alternatives to secure detention further the purposes and functions of the juvenile justice system, rather than hindering them.

This case has nothing to do with bail. Model standards which substantially restrict the discretion to detain, also oppose the use of bail for juveniles. Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Interim Status*, *supra*, at 63; *Report of the Task Force on Juvenile Justice and Delinquency Prevention*, *supra*, at 404. The problem of punitive preventive detention arises in jurisdictions throughout the country because appropriate alternatives are not adequately developed and utilized by juvenile justice officials and detention personnel.

This issue was discussed in the recent General Accounting Office report on federal efforts to change juvenile detention practices, in a section entitled, "Additional Alternatives Needed to Reduce Secure Detentions." The report noted the successful use of alternatives to secure detention:

> Many programs for juveniles have reported that they successfully served as alternatives to secure detention. University of Chicago researchers recently studied 14 local alternative programs for OJJDP and reached several significant conclusions that provide a perspective of the alternatives issues. The study concluded that:
>
> —Upwards of 90 percent of the juveniles in alternative programs did not commit new offenses or run away.
>
> —Various program formats were about equally successful in keeping juveniles out of trouble and available to the courts.

> —Residential programs, such as group homes and foster homes, were successful for both delinquents and status offenders.

GAO Report at 29. The GAO Report concluded: "Providing additional alternatives could help alleviate the problem of questionable detentions." *Id.* The report stated, further, that alternative programs must be integrated into the total juvenile justice systems to be effective:

> [T]o be highly effective these alternatives must be
>
> —used in conjunction with specific detention criteria;
>
> —properly planned, which includes identifying the type, location, and capacity of each alternative; and
>
> —properly coordinated with local detention decision makers.

Id.

Perhaps the best recent summary of the type of alternative programs, with examples of each type, appears in a publication by the National Council on Crime and Delinquency, M. Woods, *Alternatives to Imprisoning Young Offenders: Noteworthy Programs* (National Council on Crime and Delinquency 1982). Residential programs include foster family care, group homes, highly structured group care, and secure group facilities. Non-residential programs include job and career programs, afterschool or evening programs, alternative schools, "advocacy" programs, counseling, mediation and arbitration programs, and intensive services to families. *Id.* at 4-6. The report provides descriptions of dozens of "model" alternative programs across the country, including several in New York.

There have been extensive reports on alternatives to secure detention in the juvenile justice literature for at least ten years. *E.g.*, National Institute of Law Enforcement and Criminal Justice, *New Approaches to Diversion and Treatment of Juvenile Offenders* (U.S. Department of Justice 1973); Office of Technology Transfer, *Diversion Project: Urbana and*

Champaign, Illinois (U.S. Department of Justice 1977); National Office for Social Responsibility, *Diversion of Youth from the Juvenile Justice System: Project Orientation Resource Handbook* (1978); L. Ladd and M. Lynch, *Building Support for Juvenile Diversion: A Case Study of the Memphis-Metro Youth Diversion System* (U.S. Department of Justice 1979); T. Palmer and R. Lewis, *An Evaluation of Juvenile Diversion* (1980); F. Dunford, D. Osgood, and H. Weichselbaum, *National Evaluation of Diversion Projects: Executive Summary* (U.S. Department of Justice 1982). In fact, the New York State Division for Youth published its own report on types of alternative placements, *Alternative to Secure Detention Handbook*, with descriptions of residential programs (including foster homes, volunteer foster homes, proctor programs, runaway homes, agency-operated boarding homes, group homes, and "structured" group residences) and nonresidential programs (family court community aide programs, evening report centers, day treatment centers, and family crisis intervention). Thus, it is not that alternatives to secure detention are unknown or unavailable; rather, such alternatives have not been adequately developed and utilized by juvenile decisionmakers. *See* Austin and Krisberg, "The Unmet Promise of Alternatives to Incarceration," 24 *Crime and Delinquency* 374 (1982).

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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No. 82-1248-AFH
Status: GRANTED

Title: Ellen Schall, Commissioner of New York City Department of Juvenile Justice, Appellant
v.
Gregory Martin, et al.

Docketed:
January 24, 1983

Court: United States Court of Appeals for the Second Circuit

Vide:
82-1278

Counsel for appellant: Koerner, Leonard, Gordon, Judith

Counsel for appellee: Guggenheim, Martin

Entry	Date	Note	Proceedings and Orders
1	Dec 9 1982		Application for extension of time to docket appeal and order granting same until January 23, 1983 (Marshall, December 10, 1982).
2	Jan 24 1983	G	Statement as to jurisdiction filed.
3	Jan 24 1983		Appendix of appellant Ellen Schall, etc. filed.
5	Feb 15 1983		Order extending time to file response to jurisdictional statement until March 25, 1983.
6	Mar 28 1983		Motion of appellees Gregory Martin, et al. to affirm filed. VIDED.
7	Mar 30 1983		DISTRIBUTED. April 15, 1983
9	Apr 18 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with 82-1278 and a total of one hour is allotted for oral argument.
			**********
11	May 10 1983		Order extending time to file response to jurisdictional statement until August 1, 1983.
12	Jun 28 1983		Application for leave to exceed page limits on brief on merits (Robert Abrams) filed with TM (A-105b) - 82-1278
13	Jun 30 1983		Order denying same by Marshall, J.
14	Jul 15 1983		Order further extending time to file response to jurisdictional statement until August 15, 1983.
15	Aug 1 1983		Joint appendix filed. VIDED.
16	Aug 5 1983		Record filed.
17	Aug 5 1983		Certified original record, 5 volumes, received. (Box).
18	Aug 15 1983		Brief amicus curiae of Pennsylvania, et al. filed. VIDED.
19	Aug 15 1983		Brief of appellant Ellen Schall, etc. filed. VIDED.
20	Aug 16 1983		Brief amicus curiae of Texas District and County Attorneys Assn., et al. filed. VIDED.
22	Aug 29 1983		Order extending time to file response to jurisdictional statement until October 14, 1983.
23	Oct 13 1983		Brief amicus curiae of American Bar Association filed. VIDED.
24	Oct 13 1983		Brief amicus curiae of Association for Children of NJ filed. VIDED.
25	Oct 14 1983		Brief amicus curiae of National Legal Aid and Defender Association filed. VIDED.
26	Oct 14 1983		Brief amicus curiae of DC Public Defender Service filed. VIDED.
27	Oct 14 1983		Brief amicus curiae of Youth Law Center, et al. filed. VIDED.
28	Oct 14 1983		Brief of appellees Gregory Martin, et al. filed. VIDED.

No. 82-1248-AFH

Entry	Date	Note	Proceedings and Orders
29	Oct 14 1983		Brief amicus curiae of National Juvenile Law Center filed. VIDED.
30	Nov 16 1983		CIRCULATED.
31	Nov 23 1983		SET FOR ARGUMENT. Tuesday, January 17, 1984. This case is consolidated with No. 82-1278. (1 hour) (4th case)
32	Jan 10 1984	X	Reply brief of appellant Abrams, Atty. Gen. of NY in 82-1278 filed. VIDED.
33	Jan 17 1984		ARGUED.